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Case No. _____

SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978), AND HITCHCOCK v. DUGGER, 481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON THE FACT THAT THE MATTER WAS LEFT UNRESOLVED IN THE ORIGINAL OPINION AND CURRENTLY IS THE SOURCE OF IRRECONCILABLE CONFLICT BETWEEN THE STATE AND FEDERAL COURT BELOW

TABLE OF CONTENTS

	PAGE(S)
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-v
OPINION BELOW	1-2
JURISDICTION	2-3
CONSTITUTIONAL PROVISIONS INVOLVED	3-4
STATEMENT OF THE CASE	4-33
REASONS FOR GRANTING THE WRIT	34-54
CONCLUSION	55

TABLE OF AUTHORITIES

CASES	PAGE(S)
Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991)	36
Baldwin v. Alabama, 472 U.S. 372 (1985)	45
Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991)	36
Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987)	13,37
Delap v. Dugger, 890 F.2d 285 (11th Cir. 1990)	36
Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989)	36
Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991)	37
Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)	37
Hitchcock v. Dugger, 481 U.S. 393 (1987)	8,34
Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991)	36
John Hancock Insurance Co. v. Bartels, 308 U.S. 108 (1939)	44
Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989)	37

TABLE OF AUTHORITIES (Continued)

Knight v. Dugger,
863 F.2d 705 (11th Cir. 1988) 37

Lockett v. Ohio,
438 U.S. 586 (1978) 6,22,34

Magill v. Dugger,
824 F.2d 879 (11th Cir. 1987) 37

Messer v. Florida,
834 F.2d 890 (11th Cir. 1987) 37

Richardson v. Thigpen,
883 F.2d 895 (11th Cir. 1989) 44

Ruffin v. Dugger,
848 F.2d 1512 (11th Cir. 1988) 37

Satterwhite v. Texas,
486 U.S. 249 (1988) 54

Smith v. State,
424 So.2d 726 (Fla.).
cert. denied,
462 U.S. 1145 (1983) 4,6

Smith v. State,
457 So.2d 11380 (Fla. 1984) 7

Smith v. State,
556 So.2d 1096 (Fla. 1990) 9

Smith v. Dugger,
840 F.2d 787 (11th Cir. 1988) 4,8

Smith v. Dugger,
888 F.2d 94 (11th Cir. 1989) 8

TABLE OF AUTHORITIES (Continued)

Sochor v. Florida,
504 U.S. ___,
119 L.Ed.2d 326,
112 S.Ct. ___ (1992) 53

Songer v. State,
365 So.2d 696 (Fla. 1978) 22

Stone v. Dugger,
837 F.2d 1477 (11th Cir. 1988) 37

Tafero v. Dugger,
873 F.2d 249
(11th Cir. 1989) 13,30,36

OTHER AUTHORITIES

28 U.S.C. §1254(1) 3

28 U.S.C. §2254 7

Fla.R.Crim.P. 3.850 6,9

§921.141, Fla.Stat. 24

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 970 F.2d 766 (11th Cir. 1992), and is reproduced in the appendix to this pleading.[1] [A1-A3].

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[1] [A-] represents a citation to the materials contained in the appendix to this pleading.

The decision of the United States District Court for the Northern District of Florida is reported at 758 F.Supp. 688 (N.D. Fla. 1990), and is likewise reproduced in the appendix to this pleading. [A4-A47].

The decision of the Florida Supreme Court, which denied relief as to the claim now at issue, is reported at 556 So.2d 1096 (Fla. 1990), and is also set forth in the appendix to this pleading. [A48-A54].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on August 18, 1992. No petition for rehearing and suggestion for rehearing in banc was filed due to the summary nature of the order entered by a panel of the Eleventh Circuit. This Court's

jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdicition the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

On the evening of December 12, 1978, Frank Smith and two codefendants robbed, kidnapped, raped and murdered Sheila Porter. The details of the crime are adequately detailed in Smith v. State, 424 So.2d 726 (Fla.), cert. denied, 462 U.S. 1145 (1983), and Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988).

Smith was tried and convicted on all four counts in August 1979. He was subsequently sentenced to death in keeping with the recommendation of the advisory jury. The sentencing judge found and weighed the following six aggravating factors: (1) that the defendant had prior convictions for violent felonies, robberies; (2) that this murder was committed in the course of an enumerated felony, kidnapping; (3) that this murder was committed to avoid arrest; (4) that this murder was committed for pecuniary gain; (5) that this murder was heinous, atrocious and cruel; (6) that this murder was cold, calculated and premeditated. The court found one statutory mitigating factor, Smith's age of nineteen at the time the crime was committed.

Smith appealed his conviction and sentence of death to the Florida Supreme Court, raising eight issues. (None of which raised a Lockett v. Ohio, 438 U.S. 586 (1978) issue). Finding no reversible error, the Florida Supreme Court affirmed Smith's conviction and sentence of death and certiorari review was subsequently denied. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983).

As a result of a death warrant signed by the Governor of Florida in 1984, Smith filed his first petition for collateral relief, pursuant to Rule 3.850, Fla.R.Crim.P. In his state collateral litigation, Smith raised ten issues, one of which specifically asserted that "the instructions as to mitigation were restricted (Eddings v. Oklahoma; Lockett v. Ohio)." Relief was

denied after an evidentiary hearing (on the effectiveness of counsel issue), and Smith appealed. The Florida Supreme Court found most of the issues, including the Lockett v. Ohio issue, procedurally barred, and rejected on the merits any assertion that trial counsel rendered ineffective assistance of counsel. Smith v. State, 457 So.2d 1380 (Fla. 1984).

Smith then went to federal court, seeking relief pursuant to 28 U.S.C. §2254. Therein, he raised eighteen claims, one in particular asserting that both Lockett error and Hitchcock error occurred in his case. The federal district court, the same judge that heard the second successive claims, denied all relief without further evidentiary proceeding. Smith appealed to the Eleventh Circuit, raising only

six issues. One of those six issues asserted the unreliable nature of the sentencing proceeding. All relief was denied, Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Smith filed a petition for rehearing in which he raised, inter alia, a claim under Hitchcock v. Dugger, 481 U.S. 393 (1987). Although a Hitchcock-type claim was asserted prior to this point, the Hitchcock decision was decided by the United States Supreme Court after the federal district court rendered its decision and while Smith's case was pending on appeal in the Eleventh Circuit. Rehearing was subsequently denied but without prejudice to Smith's presenting his unexhausted Hitchcock claim to the Florida state courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). Smith filed a timely petition

for writ of certiorari which was denied March 19, 1990 (he did not include therein either a Lockett or a Hitchcock claim).

Smith subsequently filed a second motion for post-conviction relief in the state trial court pursuant to Rule 3.850, Fla.R.Crim.P. He raised twelve issues, one of which was a Hitchcock error. The trial court, on January 26, 1990, denied Smith's successive motion for post-conviction relief. The court found that all claims except the Hitchcock claim were procedurally barred and as to the Hitchcock claim, the trial court found the error to be harmless error beyond a reasonable doubt. On appeal the Florida Supreme Court denied all relief, Smith v. State, 556 So.2d 1096 (Fla. 1990), finding that all but the Hitchcock error was procedurally

barred and as to Hitchcock, said error was harmless beyond a reasonable doubt.

Smith then filed a successive federal habeas corpus petition in the Northern District of Florida. On June 8, 1990, the court, in Smith v. Dugger, granted relief as to the Hitchcock error, finding:

> Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the State has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of such evidence by the state court jury, and (c) this Court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this Court must GRANT conditional relief on the Hitchcock claim of petitioner Frank Smith.

[A-42]. The court further observed:

> The state trial court did not hold an evidentiary hearing to determine the harmlessness of

> Hitchcock error in Smith's case. Had the State, in any manner, contested the veracity of the proffered nonstatutory mitigating evidence, or had the record been less clear about the constraining effect of the erroneous instruction on the tactics of defense counsel, this Court might be obligated to hold such a hearing. As the record stands, however, the Hitchcock issue is clearly focused for this Court and can be resolved without an evidentiary hearing here. Accordingly, petitioner's request for an evidentiary hearing before this Court is DENIED.

[A42-A43].

Respondent timely filed a motion to alter or amend judgment. On August 15, 1990, the district court denied Respondent's motion.

The Eleventh Circuit Court of Appeals, on August 18, 1992, affirmed the granting of habeas corpus relief in a summary-style opinion, concluding:

> Our review indicates that the record well supports the district court's findings of

> fact, and the district court faithfully applied the Supreme Court's and this Circuit's precedents to the facts. This Court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[A2] (emphasis added).

The Petitioner declined to file a petition for rehearing in the Court of Appeals since it was clear that the court was unwilling to entertain Petitioner's assertion raised in its briefs that neither the district court nor for that matter the Court of Appeals had utilized the appropriate standards in assessing whether relief should be provided to Smith.

The record reflects that an erroneous jury instruction pursuant to Hitchcock, supra, was read.

In Smith's successive collateral attack asserting his Hitchcock claim,

Smith argued that the trial judge and the capital sentencing jury were led to believe they could not consider nonstatutory mitigating circumstances in reaching their respective judgments, as the appropriate sentence to be imposed. Moreover, armed with a recently acquired affidavit from trial counsel (stating that he felt restricted by the state of the law), Smith argued that the sentencing jury and the trial court were not provided with other evidence of mitigation that they could have considered. The state trial court, in its order denying relief January 30, 1990, found Smith's Hitchcock claim properly before the court, but concluded that the error was harmless beyond a reasonable doubt, citing Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), and Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989). The court observed:

. . . in determining the mere utilization of the incorrect standard jury instruction was harmless error in this case, the court considered it relevant that the prosecutor in this case did not argue to the jury that it was limited to the mitigating circumstances enumerated in §921.141, Florida Statutes -- indeed, he informed them to the contrary -- and the record affirmatively demonstrated the trial judge was aware that he was required to consider non-enumerated mitigating circumstances by virtue of the state's sentencing memorandum, see Booker v. Dugger, 520 So.2d 246 (Fla. 1988), and counsel's argument on defendant's motion to dismiss. This is deemed relevant because in Hitchcock, the prosecutor apparently told the jury it could not consider mitigating factors outside those enumerated in the statute and the record in Hitchcock made it clear that the sentencing judge refused to consider the evidence pertaining to Hitchcock's character and childhood background which had been introduced by his attorney.

In the instant case, as noted previously, Mr. Padovano [defense counsel] did not introduce non-enumerated

mitigating evidence for strategic reasons. That has been judicially determined in previous proceedings after a full and fair evidentiary hearing where Mr. Padovano testified extensively on this issue, and this record provides he was aware that he could introduce all relevant evidence under Lockett and Songer.

It is clear from the prior proceedings that Mr. Padovano didn't fail to present the non-enumerated mitigating evidence because he was unaware of that evidence for he clearly was aware of that evidence. Smith v. Dugger, supra, at 795. The record also conclusively shows he didn't abstain from presenting character evidence because of his misunderstanding of the status of the law but because that was not his defense strategy. At the evidentiary hearing, Mr. Padovano testified to his decision not to present the evidence in question in the following manner:

> [Smith's] degree of participation and his degree of responsibility was both a defense to the case and a reason to mitigate the penalty . . . I couldn't go into

> court and argue for four days that this man tried to withdraw from the felony; that he didn't want to do it; that he tried to stop Johnny Copeland. And then when the jury found him guilty, go up to the jury and say: 'Well, he did it, but he was a little sick.' You can't do that. You can't have any credibility doing that kind of thing.

This is further supported by the previous ruling of this Court on the first motion to vacate that Mr. Padovano did not call character witnesses to testify at the penalty phase because he felt it could have been harmful rather than helpful and for that reason it was considered strategic judgment.

The Court concludes that in light of the foregoing that the alleged Hitchcock error is harmless beyond a reasonable doubt under Clark v. Dugger, and Clark v. State, supra.

(State trial court order denying Rule 3.850 relief, dated January 30, 1990, pages 8-9) (emphasis added).

In the instant case, in 1984, Phil Padovano, defense counsel, was challenged as rendering ineffective assistance of counsel for failing to develop mitigating evidence. Specifically, in Claim VIII of Smith's first Rule 3.850 motion, now known to be the Hitchcock issue, he observed that the trial court:

> . . . limited consideration of mitigating circumstances to those specifically enumerated in the Florida capital sentencing statute. See Fla.Stat. §921.141(6). It thereby violated Mr. Smith's Eighth Amendment rights under Eddings v. Oklahoma, 455 U.S. 1094 (1982), since it precluded consideration of nonstatutory mitigating evidence. See also Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982).
>
> The trial court's instructions on mitigating circumstances, in their entirety, failed to guide the jury's discretion respecting the application and use of mitigating circumstances. Similarly, the trial court limited itself to

those circumstances enumerated in Florida Statute §921.141(6). (R 552). It thereby failed to consider nonstatutory mitigating circumstances in violation of Eddings, supra.

Sufficient mitigating circumstances were raised during the trial: Mr. Smith's status as an accomplice who did not actually kill Sheila Porter (R 2318-19, 2273), Mr. Smith's withdrawal from the offense before Sheila Porter was killed (R 2266-68, 2273, 2314, 2318-19), Mr. Smith's diminished capacity due to the consumption of alcohol at the time of the offense (R 2255, 2761), Mr. Smith's lack of intent to kill (R 2266-68, 2272-73, 2314), and Smith's age (R 552). See also Statement of Facts respecting the August 27th trial, supra. Of these, the trial court considered only one -- age (R 552).

The trial court's finding failed to mention any consideration of nonstatutory mitigating circumstances (R 552-3). Neither did the court's instructions identify such circumstances were before the jury or indicate to the jury that nonstatutory mitigating circumstances could be considered (R 2767). Thus,

> both the trial court and the jury were limited in the exercise of their discretion at sentencing.

(First Motion for Post-Conviction Relief, page 66-67).

In the original 3.850 motion, Smith presented summaries of potential witnesses who could have been called by Phil Padovano to present nonstatutory mitigating evidence. At that point, Smith was challenging the effectiveness of Phil Padovano with regard to the penalty phase as follows:

> . . . finally, the evidence would have corroborated and enhanced mitigating circumstances of withdrawal and lack of intent to kill. The information counsel failed to discover, prepare and present would have rebutted Florida Statute §921.141(5)(b), (d), (e), (f), (h) and (i), aggravating circumstances. It also would have presented sufficient evidence of the Florida Statute §921.141(6)(b), (d), (e) and (f), statutory mitigating circumstances and

> would have heightened the emphasis placed on §921.141(6)(a), mitigating circumstance in sentencing deliberations. Most importantly, this evidence presents a wealth of nonstatutory mitigating factors which were not presented at sentencing. This evidence demonstrates that Frank Smith was not an individual for whom a sentence of death was appropriate.

(Motion for Post-Conviction Relief, pages 77-78) [Emphasis added].

The aforenoted is just an example of the accusations made against Phil Padovano with regard to his failure to present witnesses who would have come forward with "other mitigating evidence." Pursuant to said allegations, an evidentiary hearing was held October 9, 1984, at which time Phil Padovano took the stand as a court witness and testified with regard to his strategy and handling of both the guilt and penalty phases of Smith's trial.

During the course of his testimony, he was asked whether he felt restricted with regard to the presentation of nonstatutory mitigating evidence and replied:

> Because of the time, we were operating under a court decision in Florida which said that you had to stick to statutory mitigating circumstances. Since then -- and withdrawal was not one of them.
>
> Since then, the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really say anyway. But at the time I was following the law that was existent then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.

(Evidentiary Hearing held October 9, 1984, pages 83-84).

While Phil Padovano was able to recall his strategy and tactics for

calling and not calling certain witnesses, the record bears out that Phil Padovano's memory in 1984 was flawed as to what he actually knew or did at Smith's trial in 1979. The trial record from 1979 reflects that not only did Phil Padovano understand and "not feel limited" by what nonstatutory mitigating evidence he may present but he argued same and informed the trial judge of the recent decision in Songer v. State, 365 So.2d 696 (Fla. 1978), pretrial.

On January 31, 1979, approximately seven months prior to trial, Phil Padovano filed a motion to dismiss asserting that, pursuant to Lockett v. Ohio, 438 U.S. 586 (1978), the "failure to allow the presentation of nonstatutory mitigating evidence renders the death penalty unconstitutional." (R

44). During the course of the hearing held on the motions on February 21, 1979, approximately six months prior to trial, Phil Padovano presented an argument acknowledging the issuance of Songer v. State, supra, and asserted that Florida's death penalty statute was unconstitutional because it restricted the consideration of non-statutory mitigating evidence notwithstanding Songer. Mr. Padovano observed:

> Unfortunately for my argument, Your Honor, I will tell you this in all candor, the Florida Supreme Court ruled about two weeks ago in the case of Sanger v. State [sic] that they really didn't say what they previously stated in State v. Cooper, and that the Florida Statute doesn't preclude consideration of nonstatutory mitigating circumstances. So again I would submit that argument. I want to let you know what it is but, I also want to let you know in all candor that several weeks ago the Supreme

> Court ruled against our position on that argument.

(Original Trial Record, pages 137-138).

Three months prior to Smith's trial, the Florida Legislature passed Chapter 79-353, modifying §921.141, Florida Statutes, to read in part:

> . . . in the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in §§(5) and (6). . . .

At the time of Smith's trial, defense counsel knew the state of the law; to-wit: Songer did not limit him to the presentation of mitigation found in the statute. He also was aware that the statute specifically provided no limitation with regard to mitigation based on the change in the statute three months prior to Smith's trial.

At the 1984 evidentiary hearing, Phil Padovano testified that he had a strategy at trial and he believed this strategy was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, Padovano had asserted Smith did not kill Sheila Porter. He argued Smith withdrew from any criminal endeavor after the underlying felonies were committed. Padovano stated that his strategy was solidified when, during the jury's penalty phase deliberations, they returned and asked the question as to whether Smith had to personally pull the trigger. (Evidentiary Hearing held October 9, 1984, pages 39-40).

Padovano also secured the services of a Dr. Wallace Kennedy, a psychologist who examined Smith and returned with a report that Smith was a "secondary

psychopath." Padovano indicated that he thought about using Kennedy but after the explanation in his report, believed Kennedy would be more harmful than good as a witness. (Evidentiary Hearing held October 9, 1984, pages 45-46, 102). With regard to calling other witnesses in behalf of Frank Smith, Padovano indicated he talked with other family members and did not feel that Smith's background, which was deprived and poor, would have mattered based on his strategy to go for a withdrawal defense at the penalty phase. (Evidentiary Hearing held October 9, 1984, pages 44, 62, 64, 78, 95, 98, 103). Padovano indicated that the jury's question influenced his decision whether to call witnesses at the penalty phase and that "if he thought it would have been helpful he would have done it."

(Evidentiary Hearing held October 9, 1984, page 65).

The federal district court observed:

> As petitioner points out, there was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence with eligibility for parole after 8 or 10 years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

[A30-A31].

That court, however, went beyond the findings that existed at trial, by pointing to "substantial non-record nonstatutory mitigating evidence which could have been presented 'had the

teachings of Hitchcock been available at the time of Smith's trial.'" The court observed:

> For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age fifteen; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.
>
> While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the State neither addresses this

> alleged record mitigating evidence nor explains why this Court might find such evidence to be insubstantial or incredible. As to the proffered 'non-record' nonstatutory mitigating evidence, the State neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

[A31-A33].

Without acknowledging the state of confusion which currently exists in the Eleventh Circuit among different panels of that court as to exactly what standard should be applied in assessing whether relief should be forthcoming pursuant to a "valid" Hitchcock claim, the court merely aped the Chapman standard. This was done without acknowledging the failure of the district court to apply an appropriate standard or weigh the fact that the

state court's using the Chapman standard had found the Hitchcock error harmless beyond a reasonable doubt.

There are various panel opinions emanating from the Eleventh Circuit regarding Hitchcock error which have applied different legal standards in resolving the claim. See, e.g., Tafero v. Dugger, 873 F.2d at 252, n.5 ("we are aware of conflicting viewpoints in this circuit concerning the application of a harmless Hitchcock error standard,"); Delap v. Dugger, 890 F.2d at 306, n.23 ("there is some disagreement in this circuit as to the proper role of the habeas court in weighing aggravating and mitigating evidence in a Hitchcock situation,"); Demps v. Dugger, 874 F.2d 1385, 1393 (Johnson, J., concurring and dissenting) ("the Knight decision leaves little room for the application of

harmless error analysis, except in a situation where no nonstatutory mitigating evidence would have been proffered, see Clark, supra"); Demps v. Dugger, 874 F.2d 1385, 1395 (Clark, J., concurring) ("this Court does not undertake the task of weighing the nonstatutory mitigating evidence against statutory aggravating circumstances to determine whether the evidence would have persuaded the jury to recommend life."). See also Judges Kravitch's and Hatchett's decision in Tafero v. Dugger, 873 F.2d at 252, n.4 (Hitchcock error harmless when excluded mitigating weighed against overwhelming evidence in aggravation); and Judge Fay's decision in Demps v. Dugger, supra.

The federal district court had difficulty in discerning the proper test of the Eleventh Circuit when he opined:

> Mindful that there are no precise guidelines for determining harmlessness in a Hitchcock context, see Demps, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the Hitchcock claim), the Court finds instructive, a review of Eleventh Circuit cases involving Hitchcock claims.

[A17]. The district court then fashioned "its" standard as follows:

> A synthesis of the above-cited cases leaves this Court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard had the teachings of Hitchcock and its progeny been known at the time. If, after reviewing the entire record, the Court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the Court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produces substantial mitigating evidence, the federal district court will likely find the

> exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the State to rebut. It is only when petitioner produces some, but not substantial, mitigating evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once eluded to conflicting viewpoints about the role of the habeas court in such a situation. See Tafero 873 F.2d at 252, n.5; Delap, 890 F.2d at 306, n.23.

[A26-A27].

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978), AND HITCHCOCK v. DUGGER, 481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON THE FACT THAT THE MATTER WAS LEFT UNRESOLVED IN THE ORIGINAL OPINION AND CURRENTLY IS THE SOURCE OF IRRECONCILABLE CONFLICT BETWEEN THE STATE AND FEDERAL COURT BELOW

In Hitchcock v. Dugger, 481 U.S. 393 (1987), this Court vacated the sentence of death before it, because it was clear from the record that, in violation of Lockett v. Ohio, 438 U.S. 586 (1978), instructions were given that may have prevented the Florida advisory jury and the sentencing judge from considering evidence of nonstatutory mitigation actually presented to them. This Court opined that the Respondent, the State of Florida, had made no

attempt to argue that the error was harmless or that it had had no effect upon the jury or the sentencing judge, and that, as a result, the sentence of death had to be invalidated. Hitchcock v. Dugger, 481 U.S. at 399-400. In light of the fact that most of the "Hitchcock" claims occurred in Florida and are reviewed by the Eleventh Circuit Court of Appeals, most of the federal caselaw regarding Hitchcock claims emanate from that circuit. Unfortunately, the Eleventh Circuit, in analyzing the harmfulness of a Lockett/Hitchcock error, has been unable to develop a standard of review for harmlessness which is uniformly used in said circuit. In contrast, the Florida Supreme Court has adopted a valid and workable harmless error analysis which involves a detailed consideration of all

the evidence in aggravation and mitigation presented to the sentencer at the time of sentencing, and a determination as to the effect the allegedly unconsidered evidence would have had on the jury's recommendation and the judge's ultimate sentence. In contrast, the Eleventh Circuit has granted relief in virtually every case in which a Hitchcock claim has been presented, including a number of cases such as the instant case, where the state courts have reached the opposite conclusion. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991); Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991); Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1990); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989);

Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (en banc); Messer v. Florida, 834 F.2d 890 (11th Cir. 1987); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), and Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). As will be demonstrated below, the Eleventh Circuit has absolutely no uniform standard by which the harmfulness of a Hitchcock error is determined, and the standard applied in the instant case, albeit Chapman v. California, supra, has been cited, cannot guarantee a proper Chapman analysis has been done in light of the

fact that the Eleventh Circuit, in its summary opinion, observed that the "district court faithfully applied . . . this circuit's precedents to the facts." Such a conclusion is totally incredible in light of the fact that the district court acknowledged confusion with regard to the Eleventh Circuit's "precedents" and as a result fashioned its own "harmless error analysis test." Indeed, in Gore v. Dugger, supra, the Eleventh Circuit, in a summary opinion, acknowledged the lack of agreement within the circuit on the scope of Lockett/Hitchcock harmless error analysis. It then offered the incredible observation that it did not need to "wrestle" with the issue of the proper scope of the doctrine, since all three panel members had arrived, by some unknown route, at the unanimous

conclusion that the error was not harmless. The panel opinion in Gore interestingly concluded that it was expressly not adopting the federal district court's conclusions regarding the proper scope of the doctrine, the basis for said disagreement being left to the reader's imagination. In Gore, the Eleventh Circuit not only admitted it could not formulate a coherent doctrine but also declared that the articulation and application of such a doctrine was unnecessary to the determination of a harmless error analysis in a given case. In the sixteen Florida cases reviewed by the Eleventh Circuit regarding Hitchcock error, the Court of Appeals has found, in three cases, the error harmless, due to the fact that no evidence in mitigation was or apparently could have

been presented. Clark v. Dugger, supra; Tafero v. Dugger, supra, and Demps v. Dugger, supra. In four other cases, the Court of Appeals reversed with absolutely no discussion or analysis as to whether the Hitchcock error could have been harmless. Hargrave v. Dugger, supra; Messer v. Florida, supra; Stone v. Dugger, supra, and Ruffin v. Dugger, supra. In the remaining cases, including the instant case, the Court of Appeals has granted relief, based upon a finding that the Hitchcock error was not, in fact, harmless. For example, in Tafero v. Dugger, 873 F.2d at 252. n.5, the court first acknowledged that "we are aware of conflicting viewpoints in this circuit concerning the application of a harmless Hitchcock error standard," and likewise acknowledged the same in Delap v. Dugger, 890 F.2d at 306, n.23,

stating, "There is some disagreement in this circuit as to the proper role of the habeas court in weighing aggravating and mitigating evidence in a Hitchcock situation." While acknowledging different panels within the court will apply different legal standards, the court has absolutely no interest in resolving this conflict and has denied both motions for rehearing en banc which sought resolution of this conflict.

For example, it is beyond speculation that some panels of the Eleventh Circuit, in determining the harmfulness of any Hitchcock error, look to, inter alia, the strength of the counterveiling findings in aggravation, see Tafero, 873 F.2d at 252, n.4 (. . . any Hitchcock error was harmless in light of the overwhelming aggravating circumstances . . .), whereas others,

such as the panel in Booker v. Dugger, supra, dismissed out of hand any consideration of the existence of aggravating factors. See also, Knight, 863 F.2d at 710 (. . . it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case).

The other example of fundamental disagreement is whether the court will examine the weight of the excluded mitigating evidence, or whether it will automatically refuse to find harmless error where any relevant mitigating evidence is excluded. In Jackson v. Dugger, 931 F.2d at 716, the court indicated that the excluded mitigating evidence should be examined to determine if it is "significant." If so, the error could not be deemed harmless. See also Jones v. Dugger, 867 F.2d at 1279,

stating that error would be harmless where excluded evidence is "insignificant." On the other hand, in Booker v. Dugger, 922 F.2d at 635, the court reviewed its prior decisions and found that the error could be harmless where counsel purposefully refrained from presenting mitigating evidence where none was available. In other words, the exclusion of any relevant evidence precluded a finding of harmless error. See the concurring opinion of Judge Clark in Demps v. Dugger, 874 F.2d at 1395, as well as the dissenting opinion of Judge Johnson in Gore v. Dugger, supra. Not only is there no clear majority in a number of the opinions rendered, see Demps, Knight and Ruffin, but there is neither consistency nor logic found in even the most casual review of these cases.

Albeit the effects of the Eleventh Circuit's fundamental inconsistency on this issue is for the most part limited to Florida cases, the record reflects that the Eleventh Circuit has not stopped at Florida cases. See Richardson v. Thigpen, 883 F.2d 895, 897-899 (11th Cir. 1989) (Hitchcock claim raised by Alabama petitioner). Certainly, this Court has jurisdiction to grant the writ to resolve the conflict within the Eleventh Circuit, see John Hancock Insurance Co. v. Bartels, 308 U.S. 108, 181 (1939) (certiorari granted due to intracircuit conflict and importance of question presented). Moreover, because the State of Florida is irreparably prejudiced by the fact that the Court of Appeals has failed to adopt a uniform standard in resolving identical claims of error,

which the state court applying a Chapman standard has been able to resolve, certiorari should also be granted because a conflict exists between the state supreme court and the federal courts of appeal with regard to the application of a known standard to an unchanging set of facts. See Baldwin v. Alabama, 472 U.S. 372 (1985) (certiorari granted because conflict between state supreme court and federal court of appeals).

Sub judice, the Florida Supreme Court in a well articulated opinion, found that the same set of facts reviewed by the Eleventh Circuit under a Chapman analysis resulted in a harmless Hitchcock error. The federal district court, in reviewing the same record and nonplussed by what standard it should use on the federal level, fashioned its

own standard which was totally erroneous. The Eleventh Circuit, in a summary affirmance of the granting of the writ, unbelievably stated that the district court had faithfully followed prior Eleventh Circuit decisions. But for the Florida court's uniform application of the Chapman standard, nothing was faithfully followed in the instant case. The reasoning set forth by the district court is fatally flawed, as well as the Eleventh Circuit's "analysis" under the Chapman standard. In deciding whether there was a probability there was a Hitchcock violation that could have impacted the jury's recommended sentence, the inquiry should have centered on what was presented in 1979, not what collateral counsel asserts years later could have been presented in 1979 (especially where

a tactical decision was made by Phil Padovano to limit presentation of evidence). The record in this case clearly demonstrates that in 1979 defense counsel knew about Lockett v. Ohio, supra (he filed a pretrial pleading regarding same); argued to the trial jury and the court that statutory mitigation existed and, if the jury did not consider it as statutory mitigation, it should consider it for whatever it was worth; investigated the facts and circumstances surrounding Frank Smith's life and ultimately presented no mitigating evidence at the penalty phase, because defense counsel relied on the "lingering doubt" the jury seemed to possess based on questions asked by the jury with regard to whether Smith had to be the triggerman. The district court's reliance on "substantial nonrecord,

nonstatutory mitigating evidence which 'could have been presented had the teachings of Hitchcock been available at the time of Smith's trial'" can never be the basis upon which to determine whether a Hitchcock jury instruction error probably would have impacted the jury. Lest we forget, the teaching of Hitchcock merely expanded the proclamation of Lockett v. Ohio, supra.

In the instant case, Phil Padovano, defense counsel, testified at the 1984 evidentiary hearing regarding counsel's representation at the penalty phase, that he had a strategy at trial that he believed was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, Padovano had asserted Smith did not kill Sheila Porter. He argued Smith withdrew from any criminal endeavor after the

underlying felonies were committed. Padovano stated that his strategy was solidified when, during the jury's penalty phase deliberations, the jury returned and asked the question whether Smith had to personally pull the trigger. Facts and circumstances known to Phil Padovano in 1979 are the only factors in mitigation that may be considered in assessing whether a true Hitchcock violation occurred.

Phil Padovano argued to the jury that factors discerned at trial were of a nonstatutory mitigating nature. That mitigation was rejected by the jury and rejected by the trial judge. It cannot be described as substantial in light of the totality of this record. As to the proffered nonrecord, nonstatutory mitigating evidence that came forth in 1984 and again in 1990, it is not

susceptible to scrutiny or discussion because it had no impact (it was never presented to the jury or the judge) and should not have been considered in reviewing whether Phil Padovano, in 1979, believed he was restricted in the presentation of nonstatutory mitigating evidence. It should be further observed that the very nonstatutory mitigating evidence proffered in 1990 was the nonstatutory mitigating evidence presented in 1984 when Phil Padovano's representation of Frank Smith was under attack. Smith argued Padovano rendered ineffective assistance of counsel for failing to present this evidence in the 1978 penalty phase. The allegation was never that he was restricted in the presentation of said evidence, but rather, that he failed to make a complete investigation of same. The

reason this issue is important is because both the state and the federal courts, including the district court below and the Eleventh Circuit, held that Phil Padovano did investigate, and in fact had a strategy with regard to what mitigation would be presented to the jury in 1978.

To allow nonrecord, nonstatutory mitigating evidence not presented to the jury and judge to be included in the weighing factor in assessing harmless error renders any analysis meaningless. A harmless error analysis can only be made with regard to what is known at the time the error occurred. The district court was in total error in including and factoring in nonrecord, nonstatutory mitigating evidence in its creation of the standard to be applied "based on the teachings of Hitchcock." Moreover, the

Eleventh Circuit, in its summary affirmance of same, failed to conduct any kind of analysis and merely regurgitated a citation to Chapman v. California, supra. The federal district court stated, and the Eleventh Circuit ratified the proclamation in the instant case, that because Smith now produced substantial mitigating evidence, the federal district court "will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the State to rebut." Beyond peradventure, this standard is one that can never be satisfied by the State.

Recently, this Court chided the State of Florida, in particular the Florida Supreme Court, for its failure to fully articulate its reasons in conducting a harmless error analysis.

See Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326, 112 S.Ct. ___ (1992). The court observed:

> Although we do not mean here to require a particular formulaic indication by state courts before their review for harmless federal error will pass federal scrutiny, a plain statement that the judgment survives on such an inquiry is clearly preferrable to asllusions by citation. In any event, when the citations stop as far short of clarity as these do, they cannot even arguably substitute for explicit language signifying that the State Supreme Court reviewed for harmless error.

119 L.Ed.2d at 342.

Likewise, the State would demand that the federal courts do an appropriate analysis when applying a harmless error assessment after the state court has done so with clarity and with the same federal standard but reached a contrary result to the federal courts. As observed by Justice O'Connor

in her concurring opinion in Sochor, ". . . an appellate court's bald assertion that an error of constitutional dimensions was 'harmless' (harmful) cannot substitute for a principled explanation of how the court reached that conclusion." 119 L.Ed.2d at 342. See also Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (harmless error analysis applies to penalty phase of capital case, albeit "the evaluation of consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer").

CONCLUSION

WHEREFORE, for the aforementioned reasons, Petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Case No. _____

SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

INDEX TO APPENDIX

Document	Page(s)
Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992)	A1-A3
Smith v. Singletary, 758 F.Supp. 688 (N.D. Fla. 1990)	A4-A47
Smith v. Singletary, 556 So.2d 1096 (Fla. 1990)	A48-A54

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-3831

D.C. Docket No. 90-40035

FRANK ELIJAH SMITH,

Petitioner-Appellee,
Cross-Appellant,

versus

HARRY K. SINGLETARY,

Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(August 18, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances not listed in the Florida death penalty statute. Fla.Stat. §921.141. The district court ruled that this Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), error was not harmless beyond a reasonable doubt. Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990).

Our review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts. This court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Accordingly, the district court is affirmed.*

AFFIRMED

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* The history of this case is found at Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988); Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989); Smith v. State, 556 So.2d 1096 (Fla. 1990); and Smith v. Dugger, 493 U.S. 1064 (1990).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FRANK SMITH,

Petitioner,

v. TCA 90-40035-WS

RICHARD L. DUGGER, et al., ORDER

Respondents.

This cause is before the court upon Frank Smith's second petition for writ of habeas corpus (document 1). Due to the important constitutional matters here presented, I feel obliged to set forth in detail my analysis for the benefit of those charged with the inevitable review of my decision in the federal appellate process.

I. BACKGROUND

A. Facts

The facts leading to Smith's conviction are well documented in the voluminous record of this brutal murder case. Briefly, on the evening of December 12, 1978, Smith, along with two accomplices, Johnny Copeland and Victor Hall, robbed a convenience store in Wakulla County, Florida. They then abducted the store clerk, Sheila Porter, and took her to a motel where they each committed sexual battery upon her. Victor Hall testified that the three men later drove Ms. Porter to a wooded area. There, Hall waited in the car while Smith and Copeland took her into the woods. Hall testified that he heard three gunshots, after which Copeland and Smith returned to the car alone. Sheila Porter's body was found two days later

with three bullet wounds in the back of her head.

B. Procedural History

Found guilty of robbery, kidnapping, sexual battery, and first-degree murder, Smith was sentenced to death in accordance with the jury's recommendation. The sentencing judge found and weighed the following six aggravating factors --

> (1) That the defendant had two prior convictions for violent felonies (robberies).
>
> (2) That the murder was committed in the course of an enumerated felony (kidnapping).
>
> (3) That the murder was committed to avoid arrest.
>
> (4) That the murder was committed for pecuniary gain.
>
> (5) That the murder was heinous, atrocious and cruel.
>
> (6) That the murder was cold, calculated and premeditated --

against only one mitigating factor -- that Smith was nineteen (19) years of age when the crime was committed.

Smith appealed his conviction and death sentence to the Florida Supreme Court. Finding no reversible error, the state supreme court affirmed Smith's convictions and death sentence, and certiorari review was subsequently denied. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).

The Governor of Florida denied Smith clemency and signed a warrant scheduling his execution. Smith then filed motions in the state trial court seeking a stay of execution and post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court refused to grant a stay and denied

Smith's 3.850 motion. The Florida Supreme Court affirmed the denial of post-conviction relief and further denied Smith's original petition for a writ of habeas corpus raising the single issue of ineffective assistance of appellate counsel. Smith v. State, 457 So.2d 1380 (Fla. 1984).

On October 13, 1984, Smith filed a petition for writ of habeas corpus in this court. Having stayed Smith's execution to permit time for consideration of his petition, this court held that the first ten of Smith's eighteen claims were procedurally barred. The remaining eight claims were denied on the merits without further evidentiary proceedings.

Raising six issues, Smith appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed

this court's decision after finding no violation of Smith's constitutional rights. Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Smith thereafter filed a petition for rehearing in which he raised, inter alia, a claim under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Hitchcock was decided by the United States Supreme Court after this court's decision and while Smith's case was on appeal in the Eleventh Circuit. Rehearing was subsequently denied but without prejudice to Smith's presenting his unexhausted Hitchcock claim to the Florida state courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). The Eleventh Circuit made clear that Smith's unexhausted Hitchcock claim was not foreclosed from federal review in a subsequent action, after exhaustion.

Smith filed a timely petition for certiorari which is currently pending in the U.S. Supreme Court.

On July 31, 1989, Smith filed a second Rule 3.850 motion in state trial court. He raised twelve (12) claims, including a claim of error under Hitchcock. All claims but one were found to be procedurally barred. The one exception -- Smith's Hitchcock claim -- was denied on the merits. On appeal, the Florida Supreme Court held that, while the trial court's instructions to the jury indeed violated Hitchcock, such error was harmless beyond a reasonable doubt. All other claims were found to be procedurally barred. Smith v. State, 556 So.2d 1096 (Fla. 1990).

While Smith's Hitchcock claim was still being considered in the Florida

courts, the Governor of Florida issued a second death warrant, setting Smith's execution for 7:00 a.m. on February 9, 1990. After the Florida Supreme Court denied all relief on February 8, 1990, but before his scheduled execution the following morning, Smith filed with this court a motion for stay of execution along with his second petition for writ of habeas corpus. With but a few short hours before Smith's scheduled early morning execution, and needing time to give proper consideration to both Smith's 176-page petition for writ of habeas corpus as well as the state's response, the court granted Smith's request for a stay. A complete, orderly record has now been compiled in this court, and Smith's claims are ripe for review.

II. THE HITCHCOCK CLAIM

Relying on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), petitioner first contends that the jury and the judge in the state trial court were unconstitutionally precluded from considering -- and defense counsel from presenting -- mitigating circumstances not enumerated in the Florida death penalty statute. Fla.Stat. §921.141. In Lockett, the Supreme Court concluded that the eighth and fourteenth amendments require a sentencer to consider all relevant mitigating evidence in capital cases. Despite Lockett, the advisory jury in Hitchcock was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances.

The Supreme Court found that, in the absence of a showing that the error was harmless, such exclusion of mitigating evidence rendered Hitchcock's death sentence invalid. The Court reiterated its holding in Lockett that the eighth amendment, applicable to the states through the fourteenth amendment, requires that a capital sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death.

In this case, the state trial judge gave virtually the same instruction as that given in Hitchcock. At the conclusion of the penalty phase, the trial judge instructed the jury: The mitigating circumstances which you may consider, if established by the

evidence, are these: [listing the seven statutory mitigating circumstances enumerated in the Florida death penalty statute]." In Hitchcock, the trial judge instructed: "The mitigating circumstances which you may consider shall be the following: [listing the same seven statutory mitigating circumstances]." As in Hitchcock, the jury in this case was directed to consider only statutory factors in mitigation. As in Hitchcock, then, the jury instruction given in this case violated petitioner's eight amendment right to "present any and all relevant mitigating evidence that is available." Hitchcock, 95 L.Ed.2d at 353 (quoting Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

While conceding that the trial court's instruction was erroneous, the

state respondent here argues that both the trial court and the Florida Supreme Court were correct in concluding that the error was harmless. The Eleventh Circuit has said that a Hitchcock violation is subject to harmless error analysis. Demps v. Dugger, 874 F.2d 1385, 1389 n.12 (11th Cir. 1989) (citing cases), cert. denied, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Such analysis is governed by the strict "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under Chapman, the court must presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation. See Brown v. Dugger, 831 F.2d 1547 (11th

Cir. 1987) (discussing Chapman standard where constitutionally-proscribed evidence was admitted at trial). If there remains any possibility that the jury's sentencing decision was affected by the erroneous jury instruction, and if the state cannot refute that possibility, the error cannot be deemed harmless.

While state court factual findings are entitled to a presumption of correctness under 28 U.S.C. §2254(d), harmlessness of a constitutionally erroneous jury instruction is not an issue of fact entitled to such a presumption. It is, instead, a mixed question of law and fact meriting independent consideration by a federal habeas court. This court, therefore, cannot simply defer to the state courts' findings of harmlessness. See, e.g.,

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (finding Hitchcock error not harmless despite state courts' findings to the contrary).

Mindful that there are no precise guidelines for determining harmlessness in a Hitchcock context, see Demps, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the Hitchcock claim), the court finds instructive, a review of Eleventh Circuit cases involving Hitchock claims.

In Demps, the petitioner was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on Hitchcock grounds, arguing that his jury was impermissibly precluded from considering nonstatutory mitigating circumstances. The Eleventh Circuit panel agreed, the trial judge

having given an instruction virtually identical to the one erroneously given in Hitchcock.

Judge Fay, writing the lead opinion, examined each of the four types of evidence which Demps alleged would have influenced the jury to recommend life, determined that none of the evidence excluded from the jury's consideration would have affected its sentencing recommendation, and thus concluded that any error which may have occurred was harmless. Judge Fay emphasized that, in evaluating whether a Hitchcock error is harmless, a court must -- after an in-depth review of the entire record -- "determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence." Demps, 874 F.2d at 1390.

Judge Clark agreed with Judge Fay that Demps was not entitled to a new sentencing hearing as a result of the erroneous Hitchcock instruction. He was unable to agree with Judge Fay, however, that a harmless error analysis was appropriate. Judge Clark opined that, "[w]here there is no nonstatutory mitigating evidence there can be no Hitchcock error and harmlessness need not be considered." Id. at 1396. Because he concluded that Demps failed to present even arguably credible evidence of nonstatutory mitigating circumstances, Judge Clark did not believe that the court needed to engage in harmless error analysis. He did suggest, however, that a case should be returned to the state court for resentencing if any credible nonstatutory evidence exists, whether

such evidence was heard but excluded from consideration or whether it was not even offered because Florida law at the time taught that such evidence was not admissible. Id. at 1395.

Largely because he felt the record contained no factual findings on Demps's claims of mitigating evidence, Judge Johnson dissented from the majority's finding that Demps was not entitled to a resentencing hearing under Hitchcock. Judge Johnson believed that the case should be remanded to the district court for findings as to the truthfulness of Demps's claims. If the district court were to find that Demps had no true mitigating evidence to offer, Judge Johnson would concede that any error in the jury instructions was harmless. If, on the other hand, the district court were to find any of Demps's claims of

mitigating evidence to be true, then Judge Johnson would conclude that excluding the evidence from the jury's consideration would have constituted reversible error.

Citing Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988), Judge Johnson stressed that there is a narrow range of situations in which Hitchcock error may be harmless. In Knight, respondent argued that any Hitchcock error was harmless because "so many aggravating factors were found (four) that no amount of nonstatutory mitigating evidence could change the result in this case." 863 F.2d at 710. In rejecting the state's reasoning, the Eleventh Circuit held:

> No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an

> individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of Lockett and its progeny. . . .
>
> While we are not prepared to definitively state what might constitute harmless error in the Lockett context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case.

Id. To paraphrase Judge Johnson, the Knight decision leaves little room for the application of harmless error analysis except in two limited situations: (1) where the defense produces no nonstatutory mitigating evidence, and (2) where the nonstatutory mitigating evidence presented is so insignificant that it would not have altered the jury's decision. See Demps, 874 at 1393 (Judge Johnson, dissenting); Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989).

The Eleventh Circuit has found Hitchcock error to be harmless only three times. See Demps, 874 F.2d at 1385 (error harmless where petitioner failed to present any credible evidence of mitigating circumstances); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989) (error harmless where defense counsel purposely presented no mitigating evidence for strategic reasons), cert. denied; Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (error harmless where "there simply were no nonstatutory mitigating circumstances to consider"), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). In contrast, the court has many times granted relief on Hitchcock/Lockett grounds. See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (error not harmless where there was significant

psychological evidence which the jury, if it followed the court's erroneous Hitchcock instruction, would have considered only if it rose to the level of a statutory mitigating factor -- i.e., only if the jury found that Delap committed the crime "under the influence of extreme mental or emotional disturbance"); Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (error not harmless where there was mitigating evidence in the record that petitioner was a model prisoner and "a very nice person [who] got along well with people [and] was never no trouble"); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) (error not harmless where there was mitigating evidence in the record about petitioner's mental state and his troubled family background, and the state argued only that the

Hitchcock/Lockett error was harmless because there were multiple aggravating circumstances); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) (granting relief on Hitchcock/Lockett claim, without discussion of harmlessness, where there was evidence in the record of petitioner's mental state, his lack of an adult criminal record, and the alleged domination of petitioner by his accomplice), cert. denied, 10 S.Ct. 872, 102 L.Ed.2d 995 (1989); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (error not harmless where there was evidence in the record that petitioner felt remorse for his actions); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (granting relief on Hitchcock-Lockett claim, without discussion of harmlessness, where there was mitigating evidence in the record of petitioner's

steady employment, below-average intelligence, and history of drug abuse), cert. denied, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

A synthesis of the above-cited cases leads this court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard had the teachings of Hitchcock and its progeny been known at the time. If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produces substantial mitigating

evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut. It is only when petitioner produces some, but not substantial mitigating evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once alluded to conflicting viewpoints about the role of the habeas court in such a situation. See Tafero, 873 F.2d at 252 n.5; Delap, 890 F.2d at 306 n.23.

In this case, as mentioned previously, the state urges the court to deny all relief on the basis of harmless error. The thrust of the state's argument, however, is difficult to discern. On the one hand, the state suggests that defense counsel did, in

fact, argue to the jury several alleged mitigating factors which did not fit clearly within the confines of the enumerated statutory factors. The state notes, for example, that defense counsel included in his arguments to the jury that (1) the defendant did not personally kill the victim, (2) the defendant was fifteen years old when he committed his prior robberies, (3) the defendant has been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice. The state writes:

> Clearly from the tone of the closing arguments presented, [defense counsel] intended those jurors to consider the minuteness of evidence in relationship to those mitigating factors. He was desirous that the jury and judge find statutory mitigation but he made it perfectly clear that the slightest evidence in "mitigation" be considered.

Document 7, p. 35 (emphasis in original).

If the state is suggesting that the Hitchcock error is harmless because defense counsel could and did, both present and argue, nonstatutory mitigating factors, the suggestion must be rejected. The Eleventh Circuit has made it abundantly clear that the actual introduction of nonstatutory mitigating evidence is meaningless if the jury is instructed not to consider such evidence. Delap, 890 F.2d at 304 (citing cases). Furthermore, the error is not rendered harmless just because the judge himself hears and considers nonstatutory mitigation. Jones, 867 F.2d at 1280 ("[A] trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by

Lockett error"); Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). It follows, then, that the error does not become harmless just because the state trial judge later states -- as he did in this case -- that "[e]ven if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty." See document 7, p. 35.

The state also suggests that this case is similar to Clark and Tafero, both of which resulted in findings of harmlessness because there were no mitigating factors. If, by drawing an analogy to Clark and Tafero, the state is suggesting that there simply is no nonstatutory mitigating evidence in this case, the record belies such suggestion. As petitioner points out, there was

evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example,

petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the state neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. As to the proffered "nonrecord" nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

Instead, the state directs the court's attention to the fact that a Lockett issue was the basis for a previous unsuccessful attack on trial counsel's representation under

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The state writes: "Necessarily in finding [defense counsel] made tactical decisions in the presentation of mitigating evidence at the penalty phase of the 1979 trial, and finding no prejudice under Strickland v. Washington, the harmless error analysis regarding Hitchcock is made much simpler." Document 7, p. 30. Presumably, the state wants the court to ignore the proffered evidence because the court previously found, in a Strickland setting, that counsel chose not to present mitigating evidence for strategic reasons. Such finding allowed this court, as well as the Eleventh Circuit, to conclude (without addressing the prejudice prong of the Strickland test) that petitioner's Strickland claim was without merit.

Mindful that claims under Strickland and Hitchcock are separate and distinct, the court notes that defense counsel's tactical decisions were made in the context of the law as it then existed. The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction. To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court to give the constraining instruction. Hitchcock, 95 L.Ed.2d at 347. That later decision did not make

counsel's prior performance ineffective under Strickland. It did, however, make it necessary for this court to now determine whether the erroneous instruction affected the jury's decision as to penalty. To make that determination, the court must look at the various types of nonstatutory mitigating factors which either were presented, or could have been presented, to the jury. Because of the change in the law, this court cannot merely ignore the evidence on the ground that defense counsel was previously found to have made a tactical decision not to present certain kinds of evidence during the penalty phase of the trial.

Perhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous

instruction. In Clark, 834 F.2d at 1566-70, for example, petitioner's ineffective assistance of counsel claim was denied because the court found that counsel -- after thorough investigation -- made a tactical decision to introduce no testimony during the penalty phase of Clark's trial. That same tactical decision was used to support the court's conclusion that the Hitchcock error was harmless. The court wrote:

> Here, however, there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained supra, Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever. . . . Having failed to produce evidence of any nonstatutory

> mitigating factors, Clark can hardly complain that the trial court restricted the jury's ability to consider them. We therefore conclude that any Hitchcock error was harmless.

834 F.2d at 1569-70. Importantly, there was no evidence that counsel's strategies would have been different had she defended the case post-Hitchcock. At the time of trial, and without the benefit of Hitchcock, she decided that there simply was no credible evidence of mitigating factors. Two years later, and despite the Hitchcock decision, there was still no credible evidence of mitigating factors. In such a case, counsel's tactical decision not to present mitigating evidence supports the court's denial of both a Strickland and a Hitchcock claim. Here, however, the situation is different.

In Smith's case, the record indicates that trial counsel, now a

state circuit judge, felt constrained by the court's erroneous instruction. In fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors. In addition, he has filed an affidavit describing how his strategies were limited by the instruction which he knew would be given to the jury. Perhaps most significantly, unlike in Clark, there was nonstatutory mitigating evidence in this case which either was presented or could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given. In sum, the record before me suggests that counsel's strategy would have been different had the case been tried post-Hitchcock. Under such circumstances,

this court cannot accept the state's premise that the tactical decision which supported the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim.

Because the State of Florida has placed great importance upon the advisory jury in the Florida sentencing scheme, this federal court must be especially cautious when speculating about the effect of a constitutional error on that state advisory jury. Indeed, as explained earlier, this court is required to presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation.

The brutal, senseless murder of Sheila Porter was a horrible crime and completely justified the finding of many aggravating factors. Yet, under the law binding upon this court, the State of Florida is required to do more than point this court to the enormity of the crime in order to defeat petitioner's claim for relief. Knight, 863 F.2d at 710 (relief granted where the state's only argument was that there were multiple aggravating circumstances justifying the imposition of the death penalty). Here, the state has done little else. My duty, then, is clear. Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the state has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of

such evidence by the state court jury, and (c) this court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this court must GRANT conditional relief on the Hitchcock claim of petitioner Frank Smith.

III. REQUEST FOR EVIDENTIARY HEARING

The state trial court did not hold an evidentiary hearing to determine the harmfulness of the Hitchcock error in Smith's case. Had the state in any manner contested the veracity of the proffered nonstatutory mitigating evidence, or had the record been less clear about the constraining effect of the erroneous instruction on the tactics of defense counsel, this court might be obliged to hold such a hearing. As the record stands, however, the Hitchcock

issue is clearly focused for this court and can be resolved without an evidentiary hearing here. Accordingly, petitioner's request for an evidentiary hearing before this court is DENIED.

IV. OTHER CLAIMS

Smith raises five additional claims in his petition for writ of habeas corpus. Of these five claims, four (claims III - VI) were raised before the trial court in a motion for post-conviction relief. The trial court denied Smith's motion, finding that each of the four claims was procedurally barred. The Florida Supreme Court affirmed the trial court's decision, agreeing that the four claims were procedurally barred. Smith v. [sic] clearly relied on procedural bar as an independent state basis for disposition of these four claims, there can be no

federal habeas review unless Smith can show "cause" for the default and "prejudice attributable thereto." Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Because the court concludes that Smith has not shown adequate "cause" for his default, Claims III through VI of Smith's petition shall not be addressed here.

The remaining claim in Smith's petition -- that Smith was denied his right to a full, fair, and independent determination of his second motion for post-conviction relief -- fails to raise an issue of federal law. Smith basically complains that the trial judge

signed an order prepared by the state. While others might question the propriety of such action, federal law clearly does not require that a judge personally prepare his own orders. Review of the record indicates that a fair hearing was held (albeit not an evidentiary hearing), and there is nothing to indicate that the order, by whomever prepared, does not reflect the trial judge's ruling. Absent any error under federal law, this court will not question the procedures used by the state trial court. Finding no such error, the court concludes that Smith is not entitled to relief on Claim II of his petition for habeas corpus, and the same is DENIED.

IV. CONCLUSION

Based upon the foregoing analysis, the court concludes that petitioner has

met his burden of establishing that an erroneous jury instruction given during the course of his sentencing proceeding unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute. The state has not proven beyond a reasonable doubt that the giving of this erroneous instruction to the sentencing jury was harmless. Accordingly, it is ORDERED:

The petition for writ of habeas corpus is hereby GRANTED unless the state, within a reasonable period of time, either resentences Smith in a proceeding that comports with Lockett/Hitchcock or vacates the death sentence and imposes a lesser sentence consistent with law. All other relief requested by petitioner Smith is hereby DENIED.

DONE AND ORDERED this 8th day of June, 1990.

William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

SUPREME COURT OF FLORIDA

No. 75,450

FRANK ELIJAH SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

[February 8, 1990]

PER CURIAM.

Frank Elijah Smith, a prisoner under sentence of death, appeals the denial of relief on his second motion filed under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, §3(b)(1), Fla.Const.

The facts of this case are fully discussed in the prior appeals and collateral challenges involving this appellant. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989), petition for cert. filed, No. 89-6347 (U.S. Dec. 29, 1989); Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). This appeal presents only a single issue that is not procedurally barred.

Smith argues that the instruction given by the trial court in this instance, combined with other circumstances of the case, violated the teachings of Hitchcock v. Dugger, 481 U.S. 393 (1987). As the state conceded at argument, the trial court's jury instruction in this instance facially

violated Hitchcock by failing to inform the jury that it could consider any and all mitigating evidence submitted by the defense. The question remaining is whether this error is harmless beyond a reasonable doubt.

We have reviewed the record in its entirety and are convinced that there is no reasonable possibility that the error contributed to Smith's sentence. See State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Thus, the state has met its burden of proving harmless error. The facts of this murder, which are discussed at length in the prior cases involving this appellant, disclose a heinous and calculated abduction, sequestration and rape of the victim. After the rape, the victim then was transported to an isolated location and slain execution-style. An overwhelming

body of aggravating factors was found by the trial court and sustained by this Court on direct appeal. We can entertain no reasonable doubt that the result of the sentencing hearing would not have been different had the jury heard the proper instruction and considered any available mitigating evidence.

The order of the court below is affirmed. We find all other issues raised by Smith to be procedurally barred. The consolidated application for stay of execution and motion for stay of execution pending filing and disposition of a writ of certiorari in the United States Supreme Court is denied.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., Concur
BARKETT, J., Dissents with an opinion

NO MOTION FOR REHEARING WILL BE ENTERTAINED BY THIS COURT.

BARKETT, J., dissenting.

I cannot conclude beyond a reasonable doubt that the Hitchcock v. Dugger, 481 U.S. 393 (1987), error was harmless. Defense counsel at the trial had conceded in an affidavit that he did not properly develop the available nonstatutory mitigating evidence because he believed the law forbade its introduction as evidence--an erroneous assumption reinforced by the judge's erroneous jury instruction. At the very least, an evidentiary hearing is mandated to consider the testimony proffered by the attorney in his affidavit. Moreover, even without any additional evidence of mitigation, I cannot say that if the jury had been properly instructed, the result would

have been the same beyond any reasonable doubt. For example, the jury clearly had questions pertaining to whether Smith or codefendant Copeland fired the fatal shots. During deliberations, the jury asked the judge whether a defendant must be guilty of actually pulling the trigger or whether he may be found to have used a firearm through his association as an accomplice in a murder where a firearm is used. We have previously held that the fact that the defendant might not have been the shooter is a permissible nonstatutory mitigating factor. See, e.g., Taylor v. State, 294 So.2d 648, 652 (Fla. 1974). There were other factors presented that could have been deemed nonstatutory mitigation. Yet, the jury was not told they could consider these factors in deciding the penalty. Accordingly, I

would vacate the sentence and remand for a new sentencing hearing that complies with Hitchcock.

An appeal from the Circuit Court in and for Wakulla County,

Charles D. McClure, Chief Judge - Case No. 87-66

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ORIGINAL

92-926

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

HARRY K. SINGLETARY, Secretary
Florida Department of Corrections,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The petition for writ of certiorari filed by the Florida Attorney General requests that this Court review and reverse the ruling of the United States Court of Appeals for the Eleventh Circuit and United States District Court for the Northern District of Florida which found that the proceedings resulting in Frank Smith's sentence of death violated the eighth and fourteenth amendments to the United States Constitution. The eighth amendment violation was the same as the one which this Court unanimously found to violate the Constitution in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987). As in Hitchcock, the Court of Appeals and District Court found that the Florida proceedings resulting in Frank Smith's death sentence did not allow the jury to consider mitigating evidence. The Court of Appeals and District Court also relied on the fact that the mitigating evidence which the jury was not allowed to consider was "substantial" and uncontested by the State. Given the nature of the evidence and the record in this case, the Court of Appeals and District Court concluded that the constitutional error could not be deemed harmless beyond a reasonable doubt. See Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992), citing Chapman v. California, 386 U.S. 18 (1967).

The District Court Judge in this case was Chief Judge Stafford of the Norther District of Florida. The unanimous Eleventh Circuit panel was comprised of Chief Judge Tjoflat, Judge Hatchett and Judge Edmondson. The State did not seek rehearing or en banc review.

In its current petition,[1] the State does not contest the findings of the District Court and Court of Appeals that the proceedings resulting in Frank Smith's death sentence were infected with constitutional error, nor does the State present any argument seeking to demonstrate that the District Court and Court of Appeals were wrong in finding that this case involves "substantial" mitigation which the jury was not allowed to consider. Indeed, although presenting broad assertions (see e.g., Petition, p. 52 (Court of Appeals "regurgitated" Chapman v. California); id. at p. 37 ("no uniform standard" was applied "albeit Chapman ... has been cited"); id. at p. 35 (no "uniform" standard)), not once does the State's petition explain how the acknowledged constitutional errors in these capital sentencing proceedings could be deemed harmless. The State is as unable to muster such an explanation in its current petition as it was in the District Court and Court of Appeals. See Smith v. Dugger, 758 F. Supp. 688, 694 (N.D. Fla. 1990) ("While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the State neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. As to the proffered 'nonrecord' nonstatutory mitigating evidence, the State neither contests the veracity of the proffered evidence nor offers any explanation ... about why the evidence would not have influenced the jury to recommend a life sentence."); Smith v.

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[1]The petition for writ of certiorari is referred to herein as "petition."

Singletary, 970 F.2d 766 (11th Cir. 1992) ("[O]ur review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts. This court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt."), relying on Chapman v. California, 386 U.S. 18 (1967).

What the Petitioner does say is that certiorari review should be granted because of an alleged "intracircuit" conflict in the Eleventh Circuit. However, as this response discusses, this case presents no controversy suggesting that the State's petition should be granted. The decisions of the Eleventh Circuit Court of Appeals, particularly the opinions in Hitchcock cases of the Judges who presided in Mr. Smith's case; the actual rulings of the Court of Appeals and District Court in this case; and consideration of the effect of the constitutional error under the circumstances of this particular trial, all demonstrate that the District Court and Court of Appeals were faithful to this Court's precedent and that Respondent Smith's entitlement to the relief granted is not subject to serious dispute under that precedent. The ruling of the Court of Appeals was based on the unanimous agreement of the panel and District Court that the constitutional error could not be deemed harmless in this case under any standard. The State's petition provides no argument demonstrating that the District Court and Court of Appeals erred.

This response discusses the propriety of the unanimous ruling of the District Court and Court of Appeals, a ruling which is in

full accord with the eighth amendment precedent of this Court and with the precedent of the Eleventh Circuit in cases involving claims of Hitchcock error. The Florida Supreme Court itself now relies on "Judge Stafford's learned analysis ... in Smith" when it evaluates claims of Hitchcock error. See Meeks v. Dugger, 576 So. 2d 713, 719 (Fla. 1991). Given the rulings of the District Court and Court of Appeals, the consistency of those rulings with settled precedent, and the record of this case, we respectfully submit that neither an issue of substance nor an issue open to debate is presented by the Attorney General's petition.

The decisions below involve no controversy warranting the granting of the State's petition. There is no conflict which is in any way relevant to the disposition of this case in the precedents of the Eleventh Circuit Court of Appeals. Because the petition presents no valid reason warranting a reversal of the unanimous rulings of the District Court and Court of Appeals, we respectfully submit that the request for certiorari review should be denied.

TABLE OF CONTENTS

INTRODUCTION i

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

a. Course of Proceedings 2

b. The Decision of the Court of Appeals 3

c The District Court's Order 3

d. The Facts 19

i. Jury Error 20

ii. Judge Error 22

iii. Record Mitigation 24

iv. The Inhibition on Defense Counsel 34

v. Mitigating Factors Which the Jury Did Not Hear Because of the Inhibition 46

ARGUMENT IN RESPONSE 49

(I) 49

(II) 52

(III) 55

(IV) 57

CONCLUSION 58

CERTIFICATE OF SERVICE 59

TABLE OF AUTHORITIES

Amadeo v. Zant,
108 S.Ct. 1771 (1988) 57

Banzo v. State,
464 So. 2d 620 (Fla. 2nd DCA 1984) 32

Barbera v. State,
505 So. 2d 413 (Fla. 1987) 31

Booker v. Dugger,
922 F.2d 633 (11th Cir. 1991) . . . . . 9, passim

Brookings v. State,
495 So. 2d 135 (Fla. 1986) 31

Burch v. State,
522 So. 2d 810 (Fla. 1988) 33

Caruthers v. State,
465 So. 2d 469 (Fla. 1985) 33

Chapman v. California,
386 U.S. 18 (1967) . . . . . i, passim

Clark v. Dugger,
485 U.S. 982 (1988) 8, 54

Clark v. Dugger,
843 F.2d 1561 (11th Cir. 1987) 9, 53, 54

Cooper v. Dugger,
526 So. 2d 900 (Fla. 1988) 27

Daugherty v. Dugger,
839 F.2d 1426 (11th Cir. 1988) 23

Delap v. Dugger,
890 F.2d 285 (11th Cir. 1989) . . . . . 9, passim

Demps v. Dugger,
110 S.Ct. 1834 (1990) 9, 54

Demps v. Dugger,
874 F.2d 1385 (11th Cir. 1989) 9, 54

Downs v. Dugger,
514 So. 2d 1069 (Fla. 1987) 25, 27, 31, 36

Dugger v. Delap,
110 S.Ct. 2628 (1990) 9, 50, 54

Fead v. State,
512 So. 2d 178 (Fla. 1987) 31

Foster v. State,
518 So. 2d 901 (Fla. 1988) 31

Gore v. Dugger,
763 F. Supp. 1110 (M.D. Fla. 1989) 8, 50, 54

Gore v. Dugger,
933 F.2d 904 (11th Cir. 1991) 8, 50, 51, 53, 54

Harvard v. State,
486 So. 2d 537 (Fla. 1986) 25

Hitchcock v. Dugger,
481 U.S. 393, 107 S.Ct. 1821 (1987) . . . . . i, passim

Jackson v. Dugger,
931 F.2d 712 (11th Cir. 1991) 8, 50, 51, 53-55

Jones v. Dugger,
867 F.2d 1277 (11th Cir. 1989) 51

Jordan v. State,
478 So. 2d 512 (Fla. 1st DCA 1985) 32

Lockett v. Ohio,
438 U.S. 586 (1978) 3, 7, 36, 42, 43

Mason v. State,
597 So. 2d 776 (Fla. 1992) 35

McCampbell v. State,
421 So. 2d 1072 (Fla. 1982) 31

Meeks v. Dugger,
576 So. 2d 713 (Fla. 1991) . . . . . iv, 4, 35, 36, 58

Penry v. Lynaugh,
109 S.Ct. 2934 (1989) 5

Satterwhite v. Texas,
486 U.S. 249 (1988) 50

Singletary v. Booker,
112 S.Ct. 277 (1991) 9, 50, 54

Singletary v. Gore,
112 S.Ct. 956 (1992) 8, 50, 53, 54

Singletary v. Jackson,
111 S.Ct. ___ (1991) 8, 50, 54

Skipper v. South Carolina,
476 U.S. 1 (1986) 7, 50, 51, 53

Smith v. Dugger,
758 F. Supp. 688 (N.D. Fla. 1990) . . . . . ii, passim

Smith v. Dugger,
840 F.2d 787 (11th Cir. 1988) 2

Smith v. Dugger,
888 F.2d 94 (11th Cir. 1989) 1, 2

Smith v. Singletary,
970 F.2d 766 (11th Cir. 1992) . . . . . i, passim

Smith v. State,
424 So. 2d 726 (Fla. 1982) 2, 26

Smith v. State,
457 So. 2d 1380 (Fla. 1984) 2

Smith v. State,
556 So. 2d 1096 (Fla. 1990) 1, 2, 25

Sochor v. Florida,
112 S.Ct. ___, 119 L.Ed.2d 326 (1992) 58

Songer v. State,
365 So. 2d 969 (Fla. 1978) 36, 42, 43

Songer v. Wainwright,
769 F.2d 1488 (11th Cir. 1985)(en banc) 25

Tafero v. Dugger,
110 S.Ct. 1834 (1988) 8, 54

Tafero v. Dugger,
873 F.2d 249 (11th Cir. 1989) 8, 53, 54

Thompson v. Dugger,
515 So. 2d 173 (Fla. 1987),
cert. denied, 485 U.S. 960 (1988) 36

Waterhouse v. Dugger,
522 So. 2d 341 (Fla. 1988) 30

Zeigler v. Dugger,
524 So. 2d 419 (Fla. 1988) 23

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Florida concluded that in light of the circumstances of this case, including the existence of "substantial" and "uncontested" mitigating evidence which the sentencing jury was not allowed to consider, the eighth amendment error significantly affected the jury's verdict and therefore could not be deemed harmless. The rulings of the Court of Appeals and District Court are reported as Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992), and Smith v. Dugger, 758 F. Supp. 688 (N.D. Fla. 1990). The opinions were included in the Petitioner's Appendix and copies are appended hereto.

The opinion of the Florida Supreme Court is reported as Smith v. State, 556 So. 2d 1096 (Fla. 1990), and the prior ruling of the United States Court of Appeals for the Eleventh Circuit allowing Mr. Smith to re-exhaust his Hitchcock v. Dugger claim before re-presentation to the federal courts is reported as Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989).

JURISDICTION

Respondent agrees with the Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the Petitioner that this case involves the Eighth and Fourteenth Amendments to the United States Constitution. The Respondent also submits that this case involves the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the ... right ... to have the assistance of counsel....

The Respondent submits that this case involves no Tenth Amendment issues.

STATEMENT OF THE CASE

The State's petition broadly asserts the Attorney General's displeasure with the result in the District Court and Court of Appeals. Despite its broad assertions, the petition is not faithful to the actual rulings of the District Court and Court of Appeals. Immediately below, Mr. Smith discusses the record in this case, the actual rulings of the District Court and Court of Appeals, and the consistency of those rulings with this Court's precedent.

a. Course of Proceedings

The Florida Supreme Court's opinion on direct appeal is reported as Smith v. State, 424 So. 2d 726 (Fla. 1982), and its post-conviction opinions are reported as Smith v. State, 457 So. 2d 1380 (Fla. 1984), and Smith v. State, 556 So. 2d 1096 (Fla. 1990). The Court of Appeals' previous opinion is reported as Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). The Court of Appeals' order of October 5, 1989 "clarif[ying] that [Mr. Smith's] claim based on [Hitchcock and its progeny] is not foreclosed" and that the claim should be re-exhausted in the state courts before re-presentation to the federal courts is reported as Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). The District Court's order granting relief on the Hitchcock claim is reported as Smith v. Dugger, 758 F. Supp. 688 (N.D. Fla. 1990). The Court of Appeals' opinion is reported as

Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992). Copies of the opinions of the District Court and Court of Appeals are appended to this response.

b. The Decision of the Court of Appeals

Given its consistency with settled precedent, the District Court's order was relied upon by the Court of Appeals, and it is also relied upon by Respondent herein. The Court of Appeals stated:

> In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances not listed in the Florida death penalty statute. Fla. Stat. § 921.141. The district court ruled that this Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), error was not harmless beyond a reasonable doubt. Smith v. Dugger, 758 F. Supp. 688 (N.D. Fla. 1990).
>
> Our review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts. This court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992) (footnote omitted).

c The District Court's Order

Chief Judge Stafford's thorough and well-reasoned order on the Hitchcock issue in this case has been relied upon not only by jurists in the Eleventh Circuit, it is now relied upon by members of the Florida Supreme Court, who have characterized Chief Judge Stafford's "learned analysis" as "entirely consistent" with the "prevailing view" employed to address claims of error under Lockett v. Ohio, 438 U.S. 586 (1978), and Hitchcock v. Dugger, 481 U.S. 393

(1987). See Meeks v. Dugger, 576 So. 2d 713, 719 (Fla. 1991) (Kogan and Barkett, JJ,. concurring).

Chief Judge Stafford presided over the 1985 and the current habeas corpus proceedings in this case. As his order demonstrates, he thoughtfully considered each of the relevant precedents of this Court and the Eleventh Circuit Court of Appeals, see Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992) ("[T]he district court faithfully applied the Supreme Court's and this circuit's precedents..."); discussed those precedents; evaluated the entire record; analyzed the arguments presented by Mr. Smith and by the State; reviewed all of the evidence; rendered findings of fact, and applied the appropriate eighth amendment analysis of this Court and the Eleventh Circuit Court of Appeals to those facts. See Smith, 970 F.2d at 766 ("Our review indicates that the record well supports the district court's findings of fact ... and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts.")

Chief Judge Stafford's findings of fact included his finding that "substantial" nonstatutory mitigation is involved in this case and his underlying findings that the mitigation is reliable and credible; that the mitigation included in the original trial and sentencing record was not considered by the sentencers; and that the operation of the instructions and the restrictive consideration that Judge Padovano -- Mr. Smith's trial counsel -- knew would be afforded to nonstatutory mitigation would be afforded constrained, inhibited and interfered with the efforts of counsel, whose

"tactical decisions were made in the context of the law as it then existed" and who "developed both his strategies as well as his arguments under the constraints of [the restrictive] jury instruction" then in effect. Smith v. Dugger, 758 F. Supp. 688, 695 (N.D. Fla. 1990) (emphasis supplied). Chief Judge Stafford found that "trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction;" that "[i]n fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors;" that, "unlike in Clark, there was nonstatutory mitigating evidence in this case which either was presented or could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given"; and that "the record before me suggests that counsel's strategy would have been different had the case been tried post-Hitchcock." Smith, 758 F. Supp. at 695-96 (emphasis in original).

The District Court also considered the nature of the offense, the aggravating factors, and the State's arguments -- arguments like the ones raised in the current petition -- and concluded that "under the law ... the State of Florida is required to do more than point ... [to the] crime in order to defeat Petitioner's claim for relief." Smith, 758 F. Supp. at 696. The District Court reviewed the nonstatutory mitigation which the State conceded was in the original trial record, but which the jury was not allowed to consider because of the unconstitutional instructions. Hitchcock; Penry v. Lynaugh, 109 S.Ct. 2934, 2951 (1989) (Instructions must

allow jury to "give effect" to mitigation). The District Court also reviewed those nonstatutory factors which trial counsel did not present because of the constraints he operated under. Chief Judge Stafford found that both the mitigation in the original record (which the jury was not allowed to consider under the instructions), and the mitigation which Mr. Smith presented during collateral proceeding (mitigation which trial counsel was constrained from developing and presenting because of the law then in effect), was credible and reliable.

Chief Judge Stafford also noted that although the State "conceded" in the District Court that there was mitigation in the trial record, the State never explained "why this court might find such evidence to be insubstantial or incredible." Smith, 758 F. Supp. at 694. Chief Judge Stafford also noted that as to the additional mitigation which counsel did not develop and present because of the constraints under which he operated, "the state neither contests the veracity of the evidence nor offers any explanation --- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence." Smith, 758 F. Supp. at 694. Either basis, Chief Judge Stafford concluded, establishes Mr. Smith's entitlement to relief.

The District Court expressly found that "substantial nonstatutory mitigating evidence exists in this case." Smith, 758 F. Supp. at 696. Given the State's failure to provide any explanation to support its contention that the preclusion on the

jury's consideration of this evidence should be deemed harmless, the actual record of this case, the aggravation and the substantial nature of the mitigation, the District Court concluded that the error could not be deemed harmless beyond a reasonable doubt. Smith, 758 F. Supp. at 696.

The Court of Appeals then agreed with Chief Judge Stafford that Respondent Smith was entitled to relief on each of the grounds asserted: a) because "the state trial judge prevented defense counsel from presenting ... mitigating circumstances ...," Smith, 970 F.2d at 766; and b) because, as to the mitigation which came out at trial, "the state trial judge prevented ... the jury from considering mitigating circumstances ...." Id. at 766.

Chief Judge Stafford's order also included a detailed analysis of the applicable precedents of this Court and the Eleventh Circuit Court of Appeals. See Smith, 758 F. Supp. at 690-91, 693-96 (applying and discussing Hitchcock v. Dugger, 481 U.S. 393 (1987), Lockett v. Ohio, 438 U.S. 586 (1978), Skipper v. South Carolina, 476 U.S. 1 (1986), and Chapman v. California, 386 U.S. 18 (1967)); see also Smith v. Dugger, 758 F. Supp. at 690-96 (analyzing Eleventh Circuit decisions in cases involving Hitchcock issues). The District Court noted that one of the questions it was to consider under the applicable law was whether "there was credible nonstatutory mitigating evidence that the jury either did hear [but was not instructed to consider] or could have heard had the teachings of Hitchcock and its progeny been known at the time." Smith v. Dugger, 758 F. Supp. at 693.

Explaining why the main argument asserted by the State's certiorari petition (that there allegedly is no "standard of review for harmlessness which is uniformly used in [the Eleventh Circuit]," Petition, p. 35), presents no question warranting certiorari review in this case, Chief Judge Stafford noted that, under the Eleventh Circuit's decisions, when there is a dearth of credible mitigation, Hitchcock error will be found harmless; that "[i]t is only when petitioner produces some, but not substantial, mitigating evidence that the district court's role is unclear" under the Eleventh Circuit's precedents, Smith, 758 F. Supp. at 693; and that "[i]f, as here, petitioner produces substantial mitigating evidence, the federal district court will likely find the exclusion of such evidence to be harmful error..." Smith, 758 F. Supp at 693 (emphasis in original). Notwithstanding the broad assertions presented by the Florida Attorney General's certiorari petition, this Court has never overturned the Eleventh Circuit's analysis in cases of Hitchcock error. See Singletary v. Gore, 112 S.Ct. 956 (1992) (denying state's request for certiorari review as to the ruling in Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991), and Gore v. Dugger, 763 F. Supp. 1110 (M.D. Fla. 1989)); Tafero v. Dugger, 110 S.Ct. 1834 (1988) (denying the inmate's request for certiorari review as to the ruling in Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989)); Singletary v. Jackson, 111 S.Ct. ___ (1991) (denying the State's request for certiorari review as to the ruling in Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991)); Clark v. Dugger 485 U.S. 982 (1988) (denying the inmate's request for

certiorari review as to the ruling in Clark v. Dugger, 843 F.2d 1561 (11th Cir. 1987)); Dugger v. Delap, 110 S.Ct. 2628 (1990) (denying the State's request for certiorari review as to the ruling in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989)); Singletary v. Booker, 112 S.Ct. 277 (1991) (denying the State's request for certiorari review as to the ruling in Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991)); Demps v. Dugger, 110 S.Ct. 1834 (1990) (denying the inmate's request for certiorari review as to the decision in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989)).

Those Eleventh Circuit precedents are the decisions upon which Chief Judge Stafford relied. Then, in light of the relevant precedents, the record, the arguments of the State, and his findings of fact, Chief Judge Stafford found that the error resulting from the jury's not being allowed to consider mitigation in this case could not be found harmless beyond a reasonable doubt. In its thoroughness and quality, the District Court's order speaks for itself:

> Relying on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), petitioner first contends that the jury and the judge in the state trial court were unconstitutionally precluded from considering -- and defense counsel from presenting -- mitigating circumstances not enumerated in the Florida death penalty statute. Fla. Stat. § 921.141. In Lockett, the Supreme Court concluded that the eighth and fourteenth amendment require a sentencer to consider all relevant mitigating evidence in capital cases. Despite Lockett, the advisory jury in Hitchcock was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances. The Supreme Court found that, in the absence of a showing that the error was harmless, such exclusion of mitigating evidence rendered Hitchcock's death sentence invalid. The Court reiterated its holding

in Lockett that the eighth amendment, applicable to the states through the fourteenth amendment, requires that a capital sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death.

In this case, the state trial judge gave virtually the same instruction as that given in Hitchcock. At the conclusion of the penalty phase, the trial judge instructed the jury: "The mitigating circumstances which you may consider, if established by the evidence, are these: [listing the seven statutory mitigating circumstances enumerated in the Florida death penalty statute]." In Hitchcock, the trial judge instructed: "The mitigating circumstances which you may consider shall be the following: [listing the same seven statutory mitigating circumstances]." As in Hitchcock, the jury in this case was directed to consider only statutory factors in mitigation. As in Hitchcock, then, the jury instruction given in this case violated petitioner's eighth amendment right to "present any and all relevant mitigating evidence that is available." Hitchcock, 95 L.Ed.2d at 353 (quoting Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

While conceding that the trial court's instruction was erroneous, the state respondent here argues that both the trial court and the Florida Supreme Court were correct in concluding that the error was harmless. The Eleventh Circuit has said that a Hitchcock violation is subject to harmless error analysis. Demps v. Dugger, 874 F.2d 1385, 1389 n.12 (11th Cir. 1989) (citing cases), cert. denied, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Such analysis is governed by the strict "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under Chapman, the court must presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation. See Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987) (discussing Chapman standard where constitutionally-proscribed evidence was admitted at trial). If there remains any possibility that the jury's sentencing decision was affected by the erroneous jury instruction, and if the state cannot refute that possibility, the error cannot be deemed harmless.

While state court factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), harmlessness of a constitutionally erroneous jury

instruction is not an issue of fact entitled to such a presumption. It is, instead, a mixed question of law and fact meriting independent consideration by a federal habeas court. This court, therefore, cannot simply defer to the state courts' findings of harmlessness. See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (finding Hitchcock error not harmless despite state courts' findings to the contrary).

Mindful that there are no precise guidelines for determining harmlessness in a Hitchcock context, see Demps, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the Hitchcock claim), the court finds instructive a review of Eleventh Circuit cases involving Hitchcock claims.

In Demps, the petitioner was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on Hitchcock grounds, arguing that his jury was impermissibly precluded from considering nonstatutory mitigating circumstances. The Eleventh Circuit panel agreed, the trial judge having given an instruction virtually identical to the one erroneously given in Hitchcock.

Judge Fay, writing the lead opinion, examined each of the four types of evidence which Demps alleged would have influenced the jury to recommend life, determined that none of the evidence excluded from the jury's consideration would have affected its sentencing recommendation, and thus concluded that any error which may have occurred was harmless. Judge Fay emphasized that, in evaluating whether a Hitchcock error is harmless, a court must -- after an in-depth review of the entire record -- "determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence." Demps, 874 F.2d at 1390.

Judge Clark agreed with Judge Fay that Demps was not entitled to a new sentencing hearing as a result of the erroneous Hitchcock instruction. He was unable to agree with Judge Fay, however, that a harmless error analysis was appropriate. Judge Clark opined that, "[w]here there is no nonstatutory mitigating evidence there can be no Hitchcock error and harmlessness need not be considered." Id. at 1396. Because he concluded that Demps failed to present even arguably credible evidence of nonstatutory mitigating circumstances, Judge Clark did not believe that the court needed to engage in harmless error analysis. He did suggest, however, that a case should be returned to the state court for resentencing if any

credible nonstatutory evidence exists, whether such evidence was heard but excluded from consideration or whether it was not even offered because Florida law at the time taught that such evidence was not admissible. Id. at 1395.

Largely because he felt the record contained no factual findings on Demps's claims of mitigating evidence, Judge Johnson dissented from the majority's finding that Demps was not entitled to a resentencing hearing under Hitchcock. Judge Johnson believed that the case should be remanded to the district court for findings as to the truthfulness of Demps's claims. If the district court were to find that Demps had no true mitigating evidence to offer, Judge Johnson would concede that any error in the jury instructions was harmless. If, on the other hand, the district court were to find any of Demps's claims of mitigating evidence to be true, then Judge Johnson would conclude that excluding the evidence from the jury's consideration would have constituted reversible error.

Citing Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988), Judge Johnson stressed that there is a narrow range of situations in which Hitchcock error may be harmless. In Knight, respondent argued that any Hitchcock error was harmless because "so many aggravating factors were found (four) that no amount of non-statutory mitigating evidence could change the result in this case." 863 F.2d at 710. In rejecting the state's reasoning, the Eleventh Circuit stated:

> No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of Lockett and its progeny....
>
> While we are not prepared to definitively state what might constitute harmless error in the Lockett context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case.

Id. To paraphrase Judge Johnson, the Knight decision leaves little room for the application of harmless error analysis except in two limited situations: (1) where the defense produces no nonstatutory mitigating evidence, and (2) where the nonstatutory mitigating evidence presented is so insignificant that it would not have altered the

jury's decision. See Demps, 874 at 1393 (Judge Johnson, dissenting); Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989).

The Eleventh Circuit has found Hitchcock error to be harmless only three times. See Demps, 874 F.2d at 1385 (error harmless where petitioner failed to present any credible evidence of mitigating circumstances); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989) (error harmless where defense counsel purposely presented no mitigating evidence for strategic reasons), cert. denied, ; Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (error harmless where "there simply were no nonstatutory mitigating circumstances to consider"), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). In contrast, the court has many times granted relief on Hitchcock/Lockett grounds. See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (error not harmless where there was significant psychological evidence which the jury, if it followed the court's erroneous Hitchcock instruction, would have considered only if it rose to the level of a statutory mitigating factor -- i.e., only if the jury found that Delap committed the crime "under the influence of extreme mental or emotional disturbance"); Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (error not harmless where there was mitigating evidence in the record that petitioner was a model prisoner and "a very nice person [who] got along well with people [and] was never no trouble"); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) (error not harmless where there was mitigating evidence in the record about petitioner's mental state and his troubled family background, and the state argued only that the Hitchcock/Lockett error was harmless because there were multiple aggravating circumstances); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) (granting relief on Hitchcock/Lockett claim, without discussion of harmlessness, where there was evidence in the record of petitioner's mental state, his lack of an adult criminal record, and the alleged domination of petitioner by his accomplice), cert. denied, 10 S.Ct. 872, 102 L.Ed.2d 995 (1989); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (error not harmless where there was evidence in the record that petitioner felt remorse for his actions); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (granting relief on Hitchcock/Lockett claim, without discussion of harmlessness, where there was mitigating evidence in the record of petitioner's steady employment, below-average intelligence, and history of drug abuse), cert. denied, 109 S.Ct. 3153, 103 L.Ed.2d 821 (1989).

A synthesis of the above-cited cases leads this court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard had the teachings of Hitchcock and its progeny been known at the time. If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produces substantial mitigating evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut. It is only when petitioner produces some, but not substantial, mitigating evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once alluded to conflicting viewpoints about the role of the habeas court in such a situation. See Tafero, 873 F.2d at 252 n.5; Delap, 890 F.2d at 306 n.23.

In this case, as mentioned previously, the state urges the court to deny all relief on the basis of harmless error. The thrust of the state's argument, however, is difficult to discern. On the one hand, the state suggests that defense counsel did, in fact, argue to the jury several alleged mitigating factors which did not fit clearly within the confines of the enumerated statutory factors. The state notes, for example, that defense counsel included in his arguments to the jury that (1) the defendant did not personally kill the victim, (2) the defendant was fifteen years old when he committed his prior robberies, (3) the defendant had been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice. The state writes:

> Clearly from the tone of the closing arguments presented, [defense counsel] intended those jurors to consider the minuteness of evidence in relationship to those mitigating factors. He was desirous that the jury and judge find statutory mitigation but he made it perfectly clear that the slightest evidence in "mitigation" be considered.

Document 7, p. 35 (emphasis in original).

If the state is suggesting that the Hitchcock error is harmless because defense counsel could and did, both present and argue, nonstatutory mitigating factors, the

suggestion must be rejected. The Eleventh Circuit has made it abundantly clear that the actual introduction of nonstatutory mitigating evidence is meaningless if the jury is instructed not to consider such evidence. Delap, 890 F.2d at 304 (citing cases). Furthermore, the error is not rendered harmless just because the judge himself hears and considers nonstatutory mitigation. Jones, 867 F.2d at 1280 ("[A] trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by Lockett error"); Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). It follows, then, that the error does not become harmless just because the state trial judge later states -- as he did in this case -- that "[e]ven if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty." See document 7, p. 35.

The state also suggests that this case is similar to Clark and Tafero, both of which resulted in findings of harmlessness because there were not mitigating factors. If, by drawing an analogy to Clark and Tafero, the state is suggesting that there simply is no nonstatutory mitigating evidence in this case, the record belies such suggestion. As petitioner points out, there was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15;

(6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the state neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. As to the proffered "nonrecord" nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

Instead, the state directs the court's attention to the fact that a Lockett issue was the basis for a previous unsuccessful attack on trial counsel's representation under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The state writes: "necessarily in finding [defense counsel] made tactical decisions in the presentation of mitigating evidence at the penalty phase of the 1979 trial, and finding no prejudice under Strickland v. Washington, the harmless error analysis regarding Hitchcock is made much simpler." Document 7, p. 30. Presumably, the state wants the court to ignore the proffered evidence because the court previously found, in a Strickland setting, that counsel chose not to present mitigating evidence for strategic reasons. Such finding allowed this court, as well as the Eleventh Circuit, to conclude (without addressing the prejudice prong of the Strickland test) that petitioner's Strickland claim was without merit.

Mindful that claims under Strickland and Hitchcock are separate and distinct, the court notes that defense counsel's tactical decisions were made in the context of the law as it then existed. The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction. To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court tc give the constraining instruction. Hitchcock, 95 L.Ed.2d at 347. That later decision did not make counsel's prior performance ineffective under Strickland. It did, however, make it

necessary for this court to now determine whether the erroneous instruction affected the jury's decision as to penalty. To make that determination, the court must look at the various types of nonstatutory mitigating factors which either were presented, or could have been presented, to the jury. Because of the change in the law, this court cannot merely ignore the evidence on the ground that defense counsel was previously found to have made a tactical decision not to present certain kinds of evidence during the penalty phase of the trial.

Perhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous instruction. In Clark, 834 F.2d at 1566-70, for example, petitioner's ineffective assistance of counsel claim was denied because the court found that counsel -- after thorough investigation -- made a tactical decision to introduce no testimony during the penalty phase of Clark's trial. That same tactical decision was used to support the court's conclusion that the Hitchcock error was harmless. The court wrote:

> Here, however, there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained supra, Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever.... Having failed to produce evidence of any nonstatutory mitigating factors, Clark can hardly complain that the trial court restricted the jury's ability to consider them. We therefore conclude that any Hitchcock error was harmless.

834 F.2d at 1569-70. Importantly, there was no evidence that counsel's strategies would have been different had she defended the case post-Hitchcock. At the time of trial, and without the benefit of Hitchcock, she decided that there simply was no credible evidence of mitigating factors. Two years later, and despite the Hitchcock decision, there was still no credible evidence of mitigating factors. In such a case, counsel's tactical decision not to present mitigating evidence supports the court's denial of both a Strickland and a Hitchcock claim. Here, however, the situation is different.

In Smith's case, the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction. In fact, as the state

apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors. In addition, he has filed an affidavit describing how his strategies were limited by the instruction which he knew would be given to the jury. Perhaps most significantly, unlike in Clark, there was nonstatutory mitigating evidence in this case which either was presented or could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given. In sum, the record before me suggests that counsel's strategy would have been different had the case been tried post-Hitchcock. Under such circumstances, this court cannot accept the state's premise that the tactical decision which supported the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim.

Because the State of Florida has placed great importance upon the advisory jury in the Florida sentencing scheme, this federal court must be especially cautious when speculating about the effect of a constitutional error on that state advisory jury. Indeed, as explained earlier, this court is required to presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation.

The brutal, senseless murder of Sheila Porter was a horrible crime and completely justified the finding of many aggravating factors. Yet, under the law binding upon this court, the State of Florida is required to do more than point this court to the enormity of the crime in order to defeat petitioner's claim for relief. Knight, 863 F.2d at 710 (relief granted where the state's only argument was that there were multiple aggravating circumstances justifying the imposition of the death penalty). Here, the state has done little else. My duty, then, is clear. Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the state has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of such evidence by the state court jury, and (c) this court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this court must GRANT conditional relief on the Hitchcock claim of petitioner Frank Smith.

* * * * *

> Based upon the foregoing analysis, the court concludes that petitioner has met his burden of establishing that an erroneous jury instruction given during the course of his sentencing proceeding unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute. The state has not proven beyond a reasonable doubt that the giving of this erroneous instruction to the sentencing jury was harmless. Accordingly, it is ORDERED:
>
> The petition for writ of habeas corpus is hereby GRANTED unless the state, within a reasonable period of time, either resentences Smith in a proceeding that comports with Lockett/Hitchcock or vacates the death sentence and imposes a lesser sentence consistent with law. All other relief requested by petitioner Smith is hereby DENIED.

Smith v. Dugger, 758 F. Supp. at 690-96 (all emphasis in original).

The evidence was also discussed at length in Mr. Smith's petition for writ of habeas corpus and supporting pleadings (R. Vol. 1, Doc. 1, Rec. Ex. B; R. Vol 1, Doc. 13),[2] and "substantial" evidence, see Smith v. Dugger, 758 F. Supp. at 696, was included in the appendix to the habeas petition. As the Court's order demonstrates, the District Court, after a thorough review, made findings of fact and thoughtfully applied the law to those facts. The District Court's legal analysis is on all fours with the relevant precedents. And the facts which the District Court found are richly supported by the record.

d. The Facts

Before the state courts, the District Court and Court of Appeals, and now in this Court, the State has consistently conceded

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[2]"R." refers to the Record on Appeal to the Eleventh Circuit Court of Appeals, which included all transcripts and pleadings filed during state and federal court proceedings in Mr. Smith's case.

that error under Hitchcock v. Dugger occurred at the sentencing proceedings in this case. For example, in the state trial court, the State conceded:

> On the advice of [co-]counsel who argued many of these in the Eleventh Circuit, I wish to recede from that position that there is no Hitchcock error because Mr. Nolas is correct, our standard jury instruction puts it into a mode of was it harmless error beyond a reasonable doubt under the totality of the circumstances.

(App. C to petition for writ of habeas corpus). See also Smith v. Dugger, 758 F. Supp. at 691 (State "conced[es] that the trial court's instruction was erroneous); Petition for Writ of Certiorari, Singletary v. Smith, p. 12 ("The record reflects that an erroneous instruction pursuant to Hitchcock, supra, was read.")

i. Jury Error

At sentencing the trial court first informed the jury that it would instruct them "on the factors in aggravation and mitigation that you may consider" (ROA 2721).[3] The same instruction was given to the jury in Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 1824 (1987) (Trial court instructs jury initially that it would later instruct "on the factors in aggravation and mitigation that you may consider under our law.").

The trial court's later instructions directed:

> The mitigating circumstances which you may consider, if established by the evidence, are these: [providing limited list of statutory factors]....

(ROA. 2767). This is the same instruction as the one found to violate the eighth amendment in Delap v. Dugger, 890 F.2d 285, 303-

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[3]"ROA" refers to the record on direct appeal to the Florida Supreme Court.

04 (11th Cir. 1989), cert. denied, 110 S.Ct. 2628 (1990), and is virtually the same as the one provided to the Hitchcock jury. See Hitchcock, 107 S. Ct. at 1824 ("[t]he mitigating circumstances which you may consider shall be the following..."). As in Hitchcock, the jurors in Mr. Smith's case were informed that they were limited to only the listed statutory factors.

Mr. Smith's habeas petition also discussed the fact that the prosecutor discussed only the statute's factors in his presentation, asking that those factors be placed "side-by-side" against the aggravating factors and, in discussing mitigating factors, stated:

> These, ladies and gentlemen, are the six aggravating factors that apply in this case. There are a number of enumerated mitigating factors. I'd like to review those briefly ... The first of those is that the defendant has no significant history of prior criminal activity ... The second mitigating factor [discussing extreme emotional disturbance] ... The third mitigating factor [discussing victim as participant] ... The fourth [relatively minor participation] ... [and so on until] The final mitigation factor that they [the legislature] suggests that you consider -- and this one may apply: the age of the defendant at the time of the crime.

(ROA. 2745-47)(emphasis supplied).[4]

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[4]Mr. Smith's habeas petition noted that this type of argument was the same as the one made in Delap:

> Later in his argument, the prosecutor discussed mitigation solely in terms of the statutory factors ... The prosecutor in Delap's sentencing proceeding "discussed, one by one, the statutory mitigating circumstances, clearly implying to the jury that the statutory test was exclusive." Messer v. Florida, 834 F.2d 890, 894 (11th Cir. 1987) ... As the dissenting Justice in the Supreme Court of Florida's opinion noted, "the prosecutor's argument reinforced what the jury already had been told by the judge and defense counsel -- listen to and follow the judge's instruction."

(continued...)

Mr. Smith's habeas petition discussed the affidavit of Judge Padovano, Mr. Smith's trial counsel, and the record evidence concerning counsel's presentation, a presentation which was limited to a discussion of only the statutorily "enumerated" factors. The record and the affidavit explained, and Chief Judge Stafford found, that counsel's presentation was infected by the restrictive consideration he knew would be provided to mitigating evidence.

The habeas petition also discussed the prosecutor's argument that the jury should follow only the judge's instructions concerning the mitigating factors they were allowed to consider (Petition for Writ of Habeas Corpus at 22, quoting ROA 2741). As the State conceded and as Chief Judge Stafford found, the jury was restricted in its consideration of nonstatutory mitigating factors. Before the sentencing hearing, Mr. Smith's trial counsel (now Judge Padovano) knew that the jury's consideration would be limited.

ii. Judge Error

Early on in the proceedings, the trial judge (Judge Cooksey) denied defense counsel's challenge to the limiting statutory construction and limiting instructions then in effect (See Appendix B (2) to Petition for Writ of Habeas Corpus). Thereafter, the judge made no comments indicating that he would consider nonstatutory mitigating factors. The judge's instructions to the jury were preclusive. A sentencing judge is presumed to follow his

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[4](...continued)
Delap, 890 F.2d at 303-04 (discussed at p. 23 of the habeas petition).

jury instructions. See Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988); Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988).

Mirroring the judge's review in Hitchcock, in his order the sentencing judge then restricted himself only to those mitigating factors listed in the statute:

> MITIGATING CIRCUMSTANCES (F.S. 921.141(6))
>
> The Court finds that the mitigating circumstances enumerated in F.S. 921.141(6)(a)(b)(c)(d)(e) and (f) do not apply in that: [The sentencing court then listed and rejected the statutory mitigating circumstances included in Florida Statute Section 921.141(6)(a) through (f), while finding "age," factor (g), applicable.]

(ROA 552). The wording is identical to that in Hitchcock, and reflects that only that which fell within the statute ("F.S. 921.141 (6)") was seriously considered.

As in Hitchcock, "age" (statutory factor "g") was found as a mitigating factor (See ROA 552). The judge ruled the statutory mitigating factors insufficient to outweigh the aggravating factors and sentenced Mr. Smith to death (ROA 552).

The judge made no on-the-record pronouncements indicating that he would meaningfully consider anything other than that which fell within the statute. The record makes clear that the court considered only "the mitigating circumstances enumerated" in Fla. Stat. sec. 921.141(6) (ROA 552)(emphasis supplied). Cf. Hitchcock v. Dugger, 107 S. Ct. at 1823-25 (mitigating circumstances "as enumerated in Florida Statute 921.141(6)" insufficient "to outweigh the aggravating circumstances" [emphasis in original]). The heading of the "Mitigating Circumstances" section of the sentencing order itself shows that only "F.S. 921.141(6)," -- i.e., statutory

mitigating -- circumstances were considered (ROA 552). The judge's actions at sentencing in this case track those of the judge in Hitchcock.

iii. Record Mitigation

The District Court found that "substantial" nonstatutory mitigating evidence existed in the record of this case, but that the jury was not allowed to consider this evidence. The District Court also analyzed the State's argument "that this case is similar to Clark and Tafero, both of which resulted in findings of harmlessness because there were no mitigating factors. If, by drawing an analogy to Clark and Tafero, the State is suggesting that there simply is no nonstatutory mitigating evidence in this case, the record belies such suggestion." Smith, 758 F. Supp. at 694 (emphasis supplied). The District Court listed the substantial factors from the "evidence in the record from which" a jury could have found nonstatutory mitigation. Smith, 758 F. Supp. at 694. The evidence was reliable and credible and, as to the State's arguments, which he characterized as "difficult to discern" (id. at 694), Chief Judge Stafford further noted, "While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the State neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible." Smith, 758 F. Supp. at 694.

"Substantial nonstatutory mitigating evidence exists in this case." Smith, 758 F. Supp. at 696. Chief Judge Stafford outlined

his findings on the record mitigation at page 694 of his order. On the basis of this evidence from the original record,[5] Florida Supreme Court Justice Barkett explained:

> Moreover, even without any additional [non-trial-record] evidence of mitigation, I cannot say that if the jury had been properly instructed, the result would have been the same beyond any reasonable doubt. For example, the jury clearly had questions pertaining to whether Smith or codefendant Copeland fired the fatal shots. During deliberations, the jury asked the judge whether a defendant must be guilty of actually pulling the trigger or whether he may be found to have used a firearm through his association as an accomplice in a murder where a firearm is used. We have previously held that the fact that the defendant might not have been the shooter is a permissible nonstatutory mitigating factor. See, e.g., Taylor v. State, 294 So.2d 648, 652 (Fla.1974). There were other factors presented that could have been deemed nonstatutory mitigation. Yet, the jury was not told they could consider these factors in deciding the penalty. Accordingly, I would vacate the sentence and remand for a new sentencing hearing that complies with Hitchcock.

Smith v. State, 556 So. 2d 1096, 1097 (Fla. 1990) (Barkett, J., dissenting) (emphasis in original).

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[5]Much of the record nonstatutory mitigation came out at the guilt-innocence phase. Mr. Smith's habeas petition referred to Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986), an opinion in conformity with the Eleventh Circuit's opinion in Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc), which explained that nonstatutory mitigating factors are not limited solely to evidence affirmatively "presented" by the defense at the penalty phase, but may arise from all of the evidence before the jury and judge at the trial and sentencing. See also Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987)(relying on evidence presented by the State at the guilt-innocence phase to find Hitchcock error harmful). The habeas petition further explained that if, as in Mr. Smith's case, a capital defendant's case can be "aggravated" on the basis of evidence heard at guilt-innocence, certainly a capital case can also be "mitigated" on the basis of such evidence, and that it is from the guilt-innocence phase that any mitigation relating to the "circumstances of the offense" will normally arise (Habeas Petition at 24).

The record mitigating evidence included the following:

i) That ample evidence was elicited at the trial that Mr. Smith never intended to kill Sheila Porter (ROA 2299-2300, 2266-68, 2272-73, 2314, 2318-19), and that he did not kill Sheila Porter -- codefendant Johnny Copeland did while Mr. Smith was trying to stop him (ROA 2272-73, 2266-68, 2300, 2318-19, 2313-14). Substantial evidence was also adduced that Mr. Smith renounced his participation in the criminal transaction, communicated this withdrawal to Copeland, and that he expressly tried to persuade Copeland that he should not kill the decedent (ROA 2266-68, 2272-73, 2300, 2313-14, 2318-20). At the scene of the homicide Copeland had the pistol (ROA 2268).[6] Mr. Smith tried to convince Copeland not to kill the girl (ROA 2313-14, passim), telling him "just to give [her] the money back" (ROA 2268, 2313-14), and to leave her alone (ROA 2313-14), and to "take the girl back" (ROA 2314). Mr. Smith's jury, a jury which could only have convicted on the basis of a felony murder/accomplice liability theory, see Smith v. State, 424 So. 2d 726, 731-32 (1982), a jury which deliberated a great length, which had obvious reservations about Mr. Smith's

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[6]Records of a K-Mart store established that twenty-five caliber ammunition of the same brand that was used in the homicide was purchased shortly before the offense by Johnny Copeland (ROA 2326). Copeland's girlfriend, Florence Smith, testified that when the police came to arrest Copeland, she concealed a small black pistol under the front seat of his car (ROA 2505). Copeland had given her the pistol. Following the arrest, she gave the pistol to Copeland's mother. Daniel King testified that about a week before the offense, Johnny Copeland pawned a twenty-five caliber pistol to him for $20.00 (ROA 2510). He came to repay the loan on the Friday before the offense, secured the pistol, and, at the time, test fired it in Mr. King's yard (ROA 2544).

participation in the murder and which did not believe that Mr. Smith was the triggerman (see ROA 2711-13 [jury questions to court during deliberations]), was precluded from considering, at sentencing, Mr. Smith's efforts to convince Johnny Copeland not to kill the victim, his withdrawal from the offense, his lack of intent to kill, and his abandonment of participation.

The habeas petition (p. 28-30) cited to Downs v. Dugger,

> ... the jury ... clearly was troubled by potential mitigating evidence, as reflected in a [guilt-innocence phase] question posed to the judge...:
>
> In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used...,

514 So. 2d 1071, 1072 (Fla. 1987) (granting relief on Hitchcock grounds), and Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988) (jury should have been allowed to consider that there was some evidence reflecting greater culpability on codefendant's part and granting relief on Hitchcock grounds). The habeas petition related the similarities between the question posed by Mr. Smith's jurors and the one posed in Downs.

Chief Judge Stafford found that from the "evidence in the record" the jury, among other mitigating factors, could have "concluded that"

> (1) Smith was not the triggerman who killed the victim;
>
> (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl

Smith, 758 F. Supp. at 694.

ii) That the very fact that this was conceded (by the State at trial and sentencing and the Florida Supreme Court on direct appeal) not to be a premeditated murder case, but that the evidence showed, at best, felony-murder/accomplice liability, is also a fact that mitigated. The habeas petition explained that "[i]t is the status of the offender to which Lockett and Hitchcock speak" and that the "status of this offender is that he did not commit a premeditated murder," but that the "jury was not allowed to consider, as mitigation, that Mr. Smith's culpability was founded on the codefendant's acts and on the underlying felonies" (Petition, p. 30). In addition to discussing the fact that Mr. Smith did not pull the trigger and Mr. Smith's efforts to stop Copeland, the habeas petition noted:

> As the evidence submitted in the appendix (e.g., Judge Padovano's affidavit; Department of Corrections records) reflects, and as the jury observed, at the time Mr. Smith was an undernourished 19 year old who looked like a child who had not yet reached puberty. Copeland was muscular and had a formidable appearance. Copeland also had the gun. Under such circumstances Mr. Smith, at the scene, did all that could be expected in his efforts to stop Copeland.

(Petition, p. 30 n. 4).

The District Court found this mitigating evidence reliable and explained that the fact that "Smith was guilty [only] under the felony murder doctrine" was another mitigating factor "in the record" on which the jury should have been allowed to rely. Smith, 758 F. Supp. at 694.

iii) That the only evidence which contradicted Mr. Smith's account of the events was the bargained-for accomplice

testimony of codefendant Victor Hall. The habeas petition (pp. 31-33) noted that Hall's testimony was directly contradicted by Petitioner's account and was not corroborated by other evidence elicited at trial; that Hall's status was that of an accomplice whose testimony was provided in exchange for a lesser sentence -- i.e., as Hall himself admitted on the stand, he was testifying to avoid the electric chair (ROA 2317, et seq.; 2337-38, 2344, 2354-79, 2397, passim); that Hall was substantially impeached with written notes he and Copeland had passed to each other while in the jail pretrial which detailed their plan to have Hall, who did not testify at Copeland's trial, give fabricated testimony against Mr. Smith (ROA 2380-86, 2388, 2424-29, 2463, 2470); that Hall had provided numerous inconsistent statements in the past (ROA 2401-02, 2413, 2418-22, 2429-30, 2431-50, 2469); that the jury should have been allowed to consider the mitigating effect of the fact that the only evidence implicating Mr. Smith in the capital offense came from an accomplice who had "every reason to lie" (ROA 2665), to save himself (See also ROA 2666-68, 2757); that the instructions did not allow the jury to consider as mitigation, at sentencing, the fact that questions remained to be answered, because the prosecution was essentially based on bargained-for accomplice testimony, although numerous courts even in non-capital cases have noted the inherent unreliability of such testimony (See Petition at 31-33, discussing facts and listing numerous cases). Chief Judge Stafford's rulings in this regard appear at Smith, 758 F. Supp. at 694.

iv) The habeas petition explained that evidence was elicited that Mr. Smith's capacity may well have been diminished due to the consumption of alcohol on the evening at issue (See, e.g., ROA 2255 [Mr. Smith, Hall, and Copeland "rode around, drinking Southern Comfort and gin"]). Hall testified to this, Mr. Smith's statements to law enforcement related this, and (although not heard by the jury but heard by the same judge in Copeland's trial, which took place prior to this one) Copeland also stated this. There was also evidence that Mr. Smith had smoked marijuana on that evening. Regarding the intoxication issue, the habeas petition noted that defense counsel tried to present the issue to the jury under the statutory criteria, but as he all but acknowledged, the stringent statutory criteria could not be met (ROA 2761); that nothing in the instructions permitted the jury to deliberate over these factors; that although this evidence of diminished capacity may not have risen to the stringent level required under Fla. Stat. sec. 921.141(6)(f), it was entitled to consideration;[7] and that consideration was not afforded to this mitigation independent of the statute's stringent factors, although the "possibility" of inebriation at the time of an offense is a mitigating factor. See Waterhouse v. Dugger, 522 So. 2d 341, 344

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[7]Precedent in Hitchcock cases consistently holds that Hitchcock is violated when, because of the instructions, mitigating evidence is excluded from the jury's consideration "even if it did not find that the evidence met the required threshold level for a statutory mitigating factor," Delap, 890 F.2d at 305-06, or when the evidence, although mitigating, does "not rise to the level of the Florida statutory mitigating circumstances" Booker v. Dugger, 922 F.2d 633, 636 (11th Cir. 1991).

(Fla. 1988) ("Waterhouse proffered evidence that he ... was under the influence of alcohol [on] the night of the murder.... The jurors should have been allowed to consider these factors in mitigation"); Fead v. State, 512 So. 2d 178 (Fla. 1987); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987) (intoxication and drug use may mitigate recommended sentence); Foster v. State, 518 So. 2d 901, 902 n.2 (Fla. 1988)("some" evidence of alcohol use at time of offense) (See also Petition for Writ of Habeas Corpus, pp. 34-36).

The District Court found that among the "substantial" mitigating factors which the jury should have been allowed to consider was the evidence that "Smith may have been intoxicated at the time of the offense." Smith, 758 F. Supp. at 694.

v) Relying on Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986) (jury could have relied on the nonstatutory mitigating effect of the life sentence given to a cooperating accomplice in exchange for his testimony) and to similar holdings in McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), and Downs v. Dugger, 514 So. 2d at 1172 (lesser sentence given to accomplice is a recognized nonstatutory mitigating factor), Mr. Smith's habeas petition discussed the fact that Frank Smith was prosecuted to the utmost; that Victor Hall, as the jury heard, in exchange for his testimony, was given special treatment -- no death penalty, concurrent sentences on the felonies, and the possibility of parole in "eight to ten years" (ROA 2393 [Testimony of Victor Hall: "Well, if I, you know, go to prison, you know, and keep a clean record, you know, I could be out, maybe, in eight to ten years or something like

that"]); and that the jury should have been allowed to consider the effect of Victor Hall's status as a cooperating accomplice and, in turn, the disparate treatment given to him and Mr. Smith.

The District Court found the "evidence in the record" supported nonstatutory mitigating factors that "a 'cooperating' accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same underlying felonies." Smith, 758 F. Supp. at 694.

vi) In addition, the habeas petition examined the evidence presented by the State at the trial that Mr. Smith, from the moment of his arrest, provided law enforcement officers with statements expressing his remorse (e.g., ROA 2161-68); that he voluntarily submitted to a search of his person and vehicle, and voluntarily stayed at the police stationhouse (e.g., ROA 2318-19, 2273, 2261-68); that it was Frank Smith who helped law enforcement find the decedent's body (he went with the police and directed them to the area where Johnny Copeland killed the girl and aided the officers in discovering her body (e.g., ROA 2162-63, 2513-40)); and that Mr. Smith's willingness to cooperate -- i.e., voluntarily providing statements to law enforcement, directing law enforcement to the decedent's body -- also should have been considered as mitigation (Petition for Writ of Habeas Corpus, pp. 37-39, citing Jordan v. State, 478 So. 2d 512, 513 (Fla. 1st DCA 1985) ("defendant's cooperation with law enforcement officers can be grounds for reducing or suspending a sentence"); Banzo v. State,

464 So. 2d 620, 622 (Fla. 2nd DCA 1984) ("cooperation can be grounds for reducing or suspending a sentence. . . ."); Caruthers v. State, 465 So. 2d 469, 499 (Fla. 1985) (death sentence not appropriate where there were nonstatutory mitigating circumstances, including voluntary confession).)

vii) The habeas petition discussed the evidence introduced by the State at the penalty phase concerning a 1974 robbery conviction (ROA 2721-31) which was used as an aggravating circumstance. Mr. Smith had pled guilty and received a state prison sentence. As the jury learned, at the time of that previous conviction Mr. Smith was fifteen (15) years old (ROA 2753, 2757). Mr. Smith (whose undernourishment and small stature were observed by the jury) was sent to a state prison for adults. This horrific scenario, although not afforded consideration, also mitigated against a sentence of death as it related to the background of the defendant. See Petition for Writ of Habeas Corpus at 39, citing Burch v. State, 522 So. 2d 810 (Fla. 1988)(the fact that the defendant had been incarcerated as a youth is a valid nonstatutory mitigating factor).

viii) The habeas petition (pp. 55-56) discussed an additional mitigating factor which the judge heard but the jury did not hear -- the State's vehement arguments in the Copeland trial that Copeland, not Mr. Smith, was the shooter and ringleader.

ix) Finally, the habeas petition cited to the statutory mitigating factor conceded by the State and found by the sentencing judge -- Mr. Smith's youthful age.

iv. The Inhibition on Defense Counsel

The District Court found, inter alia, that "defense counsel's tactical decisions were made in the context of the law as it then existed;" that "[p]erhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous instruction"; that "[t]he record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction"; that "the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction"; that "as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors"; that trial counsel's affidavit "describing how his strategies were limited by the instruction which he knew would be given to the jury" and the District Court's independent findings from the record demonstrate that counsel's efforts were inhibited[8]; that "... significantly, unlike in Clark, there was nonstatutory mitigating evidence in this case which either was presented or could have been presented .... had the erroneous jury instruction not been given"; that the record reflects "that counsel's strategy would have been different had the case been tried post-Hitchcock"; that "[u]nder such circumstances"

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[8] Judge Padovano's affidavit is consistent with the original record, consistent with the record of the hearing on the ineffective assistance of counsel claim (all of which Chief Judge Stafford, who presided over both petitions in this case, thoroughly reviewed), and reliable, as Chief Judge Stafford's reliance on it and his findings from the record demonstrate.

the Court could not accept the state's premise that "the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim"; that "substantial mitigating evidence exists in this case"; and that as to the "'nonrecord' nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence." Smith, 758 F. Supp. at 695-96 (emphasis in original).

The Eleventh Circuit Court of Appeals agreed with Chief Judge Stafford that "[i]n this capital case, the state trial judge prevented defense counsel from presenting ... mitigating circumstances..." Smith v. Singletary, 970 F.2d at 766. The Florida Supreme Court has also now held that when a habeas petitioner demonstrates that because of the status of the law, the sentencing proceedings constrained defense counsel's presentation of nonstatutory mitigating evidence, relief is appropriate. See Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Mason v. State, 597 So. 2d 776, 780 (Fla. 1992) (Defendant's trial counsel restricted by statutory scheme in effect at the time of defendant's trial).

Defense counsel for Mr. Smith was Philip J. Padovano (now a Circuit Judge in Florida's Second Judicial Circuit). At the time of Mr. Smith's capital proceedings, Judge Padovano's efforts to develop and present mitigation on Mr. Smith's behalf were constrained by the capital sentencing scheme then in operation.

This limiting statutory construction was challenged by Judge Padovano early on in the proceedings, but the challenge was denied by the trial judge.

Although Judge Padovano attempted to explain to Mr. Smith's trial judge that the then-recent decision in Lockett v. Ohio, 438 U.S. 586 (1978), required capital sentencers to consider nonstatutory mitigating circumstances, at the same time Judge Padovano was aware, and pointed out to the trial court, that the Florida Supreme Court's then-recent decision in Songer v. State, 365 So. 2d 969 (Fla. 1978), had held that the Florida capital sentencing statute -- and thus the jury instructions which gave effect to that statute -- satisfied Lockett. It was only after the issuance of this Court's decision in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987), that the Florida Supreme Court recognized that it had erred in Songer. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988). The trial court denied Judge Padovano's motion under Lockett.

Thus, Judge Padovano's hands were tied: the jury was to be instructed only on the statutorily enumerated factors and his development and presentation of mitigating evidence had to be relevant to those factors in order to be considered. See Meeks, 576 So. 2d at 716. As a result of these constraints on counsel, "substantial" nonstatutory mitigating evidence was not presented to Mr. Smith's capital sentencing jury, and Mr. Smith was sentenced to

death in violation of the eighth and fourteenth amendments. Smith, 758 F. Supp. at 695-96; Smith, 970 F.2d at 766.

Judge Padovano provided a sworn affidavit discussing these facts:

> At the time I represented Mr. Smith, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Smith was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The instructions to the jury and law at the time limited the mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to inform juries that they could consider other mitigating circumstances). I was aware of that limitation and prepared Mr. Smith's case accordingly. As I testified in an evidentiary hearing held in Frank Smith's case in October, 1984, when asked questions concerning why I did not develop and present nonstatutory mitigating factors or to seek jury instructions on such evidence:
>
> > [A]t the time [of Smith's trial and sentencing], we were operating under a court decision in Florida which said you had to stick to statutory mitigating circumstances. Since then -- and withdrawal was not one of them. . . . Since then, the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really said anyway. But at the time I was following the law that was in existence then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.
>
> I in fact challenged the constitutionality of the statute, because the law and instructions limited the jury to the statutory factors, but that motion was denied early in my investigation, and subsequently during the proceedings. I have again reflected on the trial and sentencing proceedings in Frank Smith's case and state that the statute and instructions then in effect tied my hands, and because of that statute, the standard instructions to capital sentencing juries then in effect, and Judge Cooksey's interpretation of that statute, I never developed, investigated, or presented nonstatutory mitigating evidence regarding Frank Smith, and did not -- could not -- seek instructions on such evidence. Since then, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987),

established that that interpretation of the Florida capital punishment statute was not constitutional. But that was the statute and instructions that I labored under at the time, and that statute, the instructions based on that statute, and its interpretation had a direct, adverse effect on my efforts on Frank Smith's behalf at the time.

Mr. Smith's capital trial and sentencing proceedings took place at a time when Florida criminal defense attorneys, prosecutors, and judges knew that the mitigating evidence on which the jury would be instructed at a capital sentencing proceeding w[as] restricted to the statutory list of section 921.141. Florida capital sentencing juries were limited strictly to the consideration of mitigating factors enumerated especially in Fla. Stat. sec. 921.141. Mr. Smith's jury was so instructed. I have always endeavored to operate in accordance with the applicable law. The irony of the situation is that the applicable law at the time tied my hands in Frank Smith's case. The restrictive instructions were in operation and were imposed upon and understood by practitioners and judges in Florida, and in particular, in the Second Judicial Circuit. Mr. Murry, my co-counsel during some of the proceedings in Mr. Smith's case, shared this view. Our investigation, preparation, and presentation was restricted by these statutory constraints.

As a court appointed attorney with limited time and resources, I understood expending time and energy on an attempt to develop and prove evidence that would not be considered to be a waste of resources. I investigated, but my penalty phase investigation was limited by an effort to produce evidence that fit within the jury instructions and statute. It was mitigating evidence that fit within the statute that I attempted to develop, with regard to the statutory mental health factors, as well as with regard to other issues (for example, Mr. Smith's history of deprivation and poverty did not fit within the statute; neither did his withdrawal from the offense before the decedent was killed; neither did his history of alcohol and substance abuse). My focus was on uncovering evidence of those statutorily enumerated mitigating circumstances which were at the time the only ones on which the capital sentencing jury would be instructed. I did not pursue or develop nonstatutory mitigation because to do so would have been fruitless (the jury would not be instructed to consider such nonstatutory mitigating circumstances under the statute and thus such factors would not have been considered by the jurors, under the instructions then in effect, nor by

Judge Cooksey, the sentencing judge). It would have been a waste of time to seek out and present such evidence, particularly when there was so much other work to do in preparing for Frank Smith's trial. My strategy as to the development of mitigating circumstances was quite simply what the law then mandated: I looked for evidence of the statutory circumstances because the law at the time precluded the consideration of any nonstatutory mitigating circumstances. No instructions on nonstatutory mitigating evidence were allowed.

My access to the assistance of a court-appointed mental health expert was also limited because there was no provision at the time for a confidential evaluation. Rather than share any information provided by an expert with the State, I obtained an advisory opinion from a local expert. I asked this expert to look at the issues of competency and sanity, and at the statutory mitigators, but never requested that he evaluate and assess Mr. Smith's background, character, or mental impairments in an effort to develop nonstatutory mental health mitigation for presentation to the court and jury. This was a direct result of the statutory constraints and jury instructions then in effect. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), I certainly would have made the required showing of need of such confidential assistance and obtained the expert's help in developing the mitigation circumstances present in Mr. Smith's case, particularly those nonstatutory mitigating circumstances which I knew could not be considered under the instructions and statute in 1978-79. A mental health professional would have provided great assistance in developing nonstatutory mitigating circumstances regarding Mr. Smith and his mental health impairments, particularly his brain dysfunction and history of epilepsy, and the effects of his childhood deprivation on his later functioning. I did not pursue such evidence then with the psychologist because of the statute's restraints. I also understand that Frank Smith's current counsel have retained Dr. Joyce Carbonell, who has evaluated Mr. Smith and tested whether he has mental impairments. I certainly would have used such nonstatutory psychological/psychiatric mitigating evidence at the time of the 1978-79 proceedings if the statute, instructions, and law had then allowed it. Indeed, I consider Dr. Carbonell to be a qualified and highly professional mental health practitioner, and have retained her services and requested that she provide me with an opinion on nonstatutory mitigating mental health evidence since the time of Frank Smith's trial. I would

have asked for expert opinions on these issues in Mr. Smith's case in 1978-79, and would have provided the evidence to the jury and judge. The statute, however, strapped my efforts.

If the proceedings were today, I certainly would have presented as a nonstatutory mitigating circumstance the disparate treatment afforded Mr. Smith's co-defendant, Victor Hall. Hall stated that he was going to receive a sentence of years, and would be eligible for parole in eight to ten years. The jury may have convicted Mr. Smith on the felony murder theory presented by the State, because of the co-defendant's testimony. Certainly any doubts the jury had about the respective roles the co-defendants (Copeland, Smith, and Hall) played in the crime could have been used to compellingly argue that this death penalty was inappropriate for Mr. Smith when one co- defendant under his plea agreement would be receiving so much less, and the other co-defendant (Copeland) was shown by the evidence to be the more culpable party. The then-prevalent law, however, strapped my efforts.

The jurors in fact asked questions of the judge at the end of the trial indicating that they were uncertain of Frank Smith's level of complicity. The defense at trial was that Frank Smith withdrew from the offense before the homicide occurred. At the trial on guilt-innocence, the judge denied a requested instruction concerning the withdrawal defense -- that Mr. Smith attempted to dissuade Copeland from killing the victim and communicated his withdrawal to Copeland. As I testified at the 1984 evidentiary hearing noted above, I never requested an instruction on Mr. Smith's withdrawal to be provided to the jury at the sentencing phase because the law did not allow it then. I would have requested such an instruction, and would have strenuously argued Mr. Smith's withdrawal even under the standard nonstatutory mitigating evidence instruction put in effect after Mr. Smith's trial, if the law had then allowed the jury to consider such factors.

Another area that I certainly would have explored in an effort to uncover nonstatutory mitigation would have been the relationship between Mr. Smith and Mr. Copeland. At the time, there was evidence that Mr. Copeland was the more dominant personality. Domination could have been further developed and argued as nonstatutory mitigation justifying the imposition of a sentence of less than death. There was obvious evidence of this. For example, Mr. Smith was small in stature; Mr. Copeland was well-developed and had a threatening stature and

> demeanor. However, because I was aware that the law in effect at the time did not permit the consideration of nonstatutory mitigation, I did not pursue such evidence and instead focused my attention on the development of statutory mitigating circumstances. My argument was presented in terms of the statute and jury instructions. Mitigation concerning the fact that Frank Smith was the follower (for example, background and historical evidence that Copeland had always been the leader and Smith the follower, from their younger days, and even in a prior offense) did not rise to the statutory level, and thus was not developed because it would not have been considered. Other information concerning Mr. Smith's character and background also could have been developed and presented had the statute not tied my hands -- Mr. Smith grew up in stark poverty, an epileptic child, was malnourished and diminutive, and was incarcerated in adult prison facilities at the age of 15 with grown men. These and other factors of nonstatutory mitigation were not developed or presented because of the statute's constraints. My argument focused exclusively on the statutory aggravating and mitigating factors. This affidavit reflects some of the matters that I would have attempted to develop but for the statute then in effect. In short, I can state that if the proceedings were conducted under the post-Hitchcock understanding of lawyers and judges, and under the post- Hitchcock instructions, my approach and presentation at the sentencing phase would have been considerably different.
>
> In sum, the statute, the standard jury instructions, the trial court's construction, and the then-prevalent law and standards of practice in Florida and particularly in the Second Judicial Circuit strapped me and inhibited my efforts, and detrimentally affected what I was able to develop, investigate, and present on Frank Smith's behalf.

(App. A (1) to Petition for Writ of Habeas Corpus, Affidavit of Judge Padovano.)

Judge Padovano's affidavit is consistent with the record of Mr. Smith's trial and with the record of prior post-conviction proceedings in this case. As Judge Padovano's affidavit explains, shortly after he assumed Mr. Smith's representation, he filed a motion challenging the constitutionality of the Florida capital

sentencing scheme in light of Lockett. At the hearing on that motion, Judge Padovano argued:

> There are three new death penalty arguments that we are making, that to my knowledge have not been previously made in trial courts, challenging the death penalty. The first of which I will give you very quickly because the Supreme Court of Florida ruled on it last week. It's the argument that the Florida statute is unconstitutional as a violation of the eighth amendment because it does not permit consideration by the trial judge of non-statutory mitigating circumstances. Now, our supreme court held in State vs. Cooper, at 336 Southern Second, 1133, that the mitigation circumstances set forth in the capital sentencing statute are exclusive; that is to say that the Court can not consider any others. Several months ago the United States Supreme Court in the case of Lockett vs. Ohio, which is cited in my memorandum, held that an Ohio statute which precluded consideration of non-statutory mitigating circumstances is invalid as a violation of the eighth amendment. I would submit that for the reasons that the Ohio statute was declared unconstitutional by the United States Supreme court, that the Florida statute is likewise unconstitutional. Unfortunately for my argument, Your Honor, and I will tell you this in all candor, the Florida Supreme court ruled about two weeks ago in the case of Sangar [sic] vs. State, that they really didn't say that in the previous case of State vs. Cooper, and that the Florida statute doesn't preclude consideration of non-statutory mitigating circumstances. So again I would submit that argument. I wanted to let you know what it is, but I also want to let you know in all candor that several weeks ago the Supreme Court ruled against our position on that argument. I don't intend to stop with it there, but I do feel it is my obligation to present it to the Court. I certainly do not think that this Court has the power to overrule the Florida Supreme Court in Sangar vs. State [sic].

(App. B(2) to Petition for Writ of Habeas Corpus, pp. 137-38)(emphasis added).

Judge Padovano argued to the trial court that although Lockett required consideration of nonstatutory mitigating factors, the Florida Supreme Court's decision in Songer had held that the Florida statute -- and the jury instructions emanating from it --

somehow complied with Lockett. Thus, he was forced to concede that under the law then in effect in Florida ("Unfortunately for my argument"), binding upon the trial court ("I certainly do not think that this court has the power to overrule the Florida Supreme Court"), the jury instructions as written had been upheld and the Florida Supreme Court believed them to allow for constitutionally sufficient consideration of mitigating factors. In Hitchcock, this Court held that Judge Padovano's, not the Florida Supreme Court's view of the eighth amendment was right. But the unconstitutional construction was the one under which Judge Padovano was forced to operate at the time of Mr. Smith's trial.

At that same hearing, the State said:

> The Supreme Court in [Lockett] reversed the death penalty solely because the Ohio Statute do[es] not provide for [statutory] mitigating factors, as does the Florida statute in Sangar vs. State [sic]....

(App. B(2) to Petition for Writ of Habeas Corpus, p. 145). As noted above, the trial court denied the defense motion (Id.).

Thus, from the outset of his representation of Mr. Smith, Judge Padovano understood that the jury would be instructed only on the statutory mitigating factors and that the Songer opinion foreclosed any argument on the issue. As his affidavit explains and as the record reflects, that understanding controlled and guided his efforts at developing and presenting mitigation.

That Judge Padovano's investigation and preparation for the penalty phase were guided by this understanding of the statute is also confirmed by a Motion for Mental Examination (App. B(1) to

Petition for Writ of Habeas Corpus) filed pretrial. In that motion, Judge Padovano argued:

> The Defendant, FRANK SMITH, moves pursuant to Fla. R. Crim. P. 3.210 and Sec. 921. 141(6)(b,e,f) Fla. Stat. (1975), for an Order of the court appointing two disinterested qualified experts ... [and as] grounds for this motion the undersigned ... represents ...:
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> * * *
>
> 4. The Penalty Phase under Sec. 921.141 Fla. Stat. (1975) allows evidence upon a conviction of first degree murder in support of the following mitigating factors:
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> a) That the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance;
>
> b) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law are substantially impaired.
>
> 5. Counsel for the Defendant wishes to submit evidence and present argument relating to these mitigating factors in the event that it becomes necessary....

(App. B(1) to Petition)(emphasis added). Judge Padovano at the time knew that the jury would be allowed to consider only mental health evidence relevant to the statutory mental health mitigating factors.

In his penalty phase closing argument Judge Padovano then focused exclusively on the statutory mitigating factors, repeatedly referring to "these" mitigating circumstances (ROA 2748, 2749, 2750, 2751, 2757), and attempting to fit the evidence into the statutory criteria. For example, Judge Padovano argued that Mr. Smith's age was a statutory mitigating factor (ROA 2758)(see Fla. Stat. sec. 921.141(6)(g)); he argued that "the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor" (ROA. 2759)(see Fla. Stat. sec.

921.141(6)(d)); he argued that the statutory mitigating factor "that the defendant acted under the extreme duress or under the substantial domination of another person, could apply ... [b]ut I don't forcefully argue that mitigating circumstance" (ROA 2760)(see Fla. Stat. sec. 921.141(6)(e)); and he said "that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ... is another one that sort of comes in ... in a marginal respect" (ROA 2760) because of the evidence that Mr. Smith had been smoking marijuana and drinking on the night of the offense (ROA 2761)(see Fla. Stat. sec. 921.141(6)(f)).

As the District Court found, Judge Padovano's argument "tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors." Smith, 758 F. Supp. at 695; see also Petition for Writ of Habeas Corpus, pp. 69-70 (discussing Judge Padovano's efforts to argue that the substantial domination factor "could apply" and that the capacity to conform factor "sort of comes in ... in a marginal respect.") The jury instructions did not include any instruction allowing the jury to consider nonstatutory mitigation. Judge Padovano's penalty phase presentation and argument were thus tailored to the statutory mitigating factors on which he knew the jury would be instructed.

Judge Padovano's testimony during the prior proceedings on the ineffective assistance claim is also consistent with his affidavit, the trial record and the findings of Chief Judge Stafford -- who had presided at the ineffective assistance of counsel proceedings

in Mr. Smith's case. At the evidentiary hearing, Judge Padovano testified that at the time of Mr. Smith's trial he understood that statutory mitigating factors were the only ones the jury would be allowed to consider (Petition for Writ of Habeas Corpus, pp. 71-72, quoting testimony). In accordance with this view, Judge Padovano testified that he consulted a psychologist at the time of trial pursuing solely statutory factors (Id., citing 1984 Hearing Tr. 69, 76-77, 83-87), but that he did not attempt to develop a wide variety of mental health and other available nonstatutory mitigating evidence regarding Mr. Smith because introduction of such evidence would not have been allowed (Id.) As Judge Padovano explained when testify, "[A]t the time I was following the law that was existent then ... I guess I could have done it [tried again to introduce nonstatutory mitigating evidence] and had Judge Cooksey tell me: No, that's the law. You can't do it ..." (Id.).

In the District Court, the State conceded that Judge Padovano was truthful in his affidavit. Chief Judge Stafford's findings concerning the constraints under which Judge Padovano operated are founded on a wealth of evidence, and have ample record support. As the Eleventh Circuit noted "the record well supports the district court's findings" that "[i]n this capital case, the state trial judge prevented defense counsel from presenting ... mitigating circumstances ..." Smith, 970 F.2d at 766.

v. Mitigating Factors Which the Jury Did Not Hear Because of the Inhibition

The District Court found that among the "substantial mitigating evidence" which exists in this case, Smith, 758 F. Supp.

at 696, were factors which the jury did not hear because "defense counsel [was] constrained by the court's erroneous instruction" (id. at 696) and that these factors "could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given." Id. at 695. "[C]ounsel's strategy would have been different" had the jury been allowed to consider nonstatutory mitigating factors. Id. at 695. As Judge Padovano testified at the hearing and attested in his affidavit, he would have presented nonstatutory mitigating evidence if the jury would have been allowed to consider such factors (See Petition for Writ of Habeas Corpus, p. 124, quoting record transcripts).

Finding that the nonstatutory mitigating factors in this case were "substantial," Smith, 758 F. Supp. at 696, and based on credible and reliable evidence, Chief Judge Stafford addressed the State's arguments:

> [T]he state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

Smith, 758 F. Supp. at 694. The mitigating factors were supported by a wealth of relevant, admissible, and persuasive evidence, including sworn affidavits, historical records, mental health evaluations from highly qualified practitioners, and other records. The evidence was collected in the voluminous Appendix to Mr. Smith's Petition for Writ of Habeas Corpus (See R. Vol 1, Doc. 1; Rec. Ex. B; R. Vol. 1, Doc. 13). In the interest of economy,

Respondent's counsel does not detail all of this mitigating evidence herein.

Chief Judge Stafford provided a summary concerning the mitigating factors arising from this evidence at Smith, 758 F. Supp. at 694:

> Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

ARGUMENT IN RESPONSE

As demonstrated by the discussion presented above, the State's arguments do not overcome the propriety of the ruling of the District Court and Court of Appeals and do not state a ground sufficient to warrant certiorari review. The District Court and Court of Appeals carefully considered and applied this Court's precedents. The District Court and Court of Appeals did not overlook any of the relevant facts. The District Court and Court of Appeals fully considered the State's arguments, despite the fact that they were "difficult to discern." Smith v. Dugger, 758 F. Supp. 688, 693 (N.D. Fla. 1990). And the District Court and Court of Appeals applied this Court's law to the uncontested, Smith, 758 F. Supp. at 694, and "substantial," id. at 696, circumstances establishing Frank Smith's entitlement to relief.

The Attorney General's petition expresses displeasure at the ruling of the District Court and Court of Appeals, but that displeasure surely does not establish that certiorari review should be granted. The State's specific arguments are addressed below.

(I)

While recognizing that most of the law "regarding Hitchcock claims emanate[s] from" the Eleventh Circuit Court of Appeals, Petition, p. 35, the Attorney General asserts that certiorari review should be granted because the Court of Appeals "has been unable to develop a standard of review for harmlessness which is uniformly used in said circuit." Petition, p. 35; see also id. at

37 ("absolutely no uniform standard").[9] In Mr. Smith's case, however, the District Court and then the Court of Appeals unanimously concluded that relief was warranted under any of the Hitchcock decisions of the Eleventh Circuit Court of Appeals. See Smith v. Dugger, 758 F. Supp. at 691-95 (analyzing the Court of Appeals' precedent).

This Court has noted that courts should be cautious in evaluation of the consequences of error in the penalty phase of a capital trial because of the discretion that is given to the jury. Satterwhite v. Texas, 486 U.S. 249, 258 (1988). This Court has accordingly held that when a capital sentencing jury is restricted from considering mitigating evidence, relief is appropriate unless the reviewing court can "confidently conclude" that the error "had no effect upon the jury's deliberations." Skipper v. South Carolina, 476 U.S. 1, 8 (1976). The standard under this Court's precedents is thus one of harmlessness beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967), relied on in Satterwhite and Skipper. This is precisely the standard applied by the District Court and Court of Appeals in Mr. Smith's case. See Smith

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[9]This is the same argument which the Florida Attorney General presented in Singletary v. Gore, 112 S.Ct. 956 (1992) (denying state's request for certiorari review as to the ruling in Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991), and Gore v. Dugger, 763 F. Supp. 1110 (M.D. Fla. 1989)); Singletary v. Jackson, 111 S.Ct. ___ (1991) (denying the State's request for certiorari review as to the ruling in Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991)); Dugger v. Delap, 110 S.Ct. 2628 (1990) (denying the State's request for certiorari review as to the ruling in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989)); and Singletary v. Booker, 112 S.Ct. 277 (1991) (denying the State's request for certiorari review as to the ruling in Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991)).

v. Singletary, 970 F.2d 766 (11th Cir. 1992), relying on Chapman v. California; Smith v. Dugger, 758 F. Supp. at 696 (applying the harmlessness beyond a reasonable doubt standard).

Contrary to the Attorney General's assertion, the Eleventh Circuit's application of the Chapman standard to cases of Hitchcock error uniformly looks to "the circumstances of [the] particular trial." Gore v. Dugger, 933 F.2d 904, 905 (11th Cir. 1991), cert. denied, 112 S.Ct. 956 (1992); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), cert. denied 110 S.Ct. 2628 (1990); Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991), cert. denied, 112 S.CT. 277 (1991). There is no question that the District Court and Court of Appeals carefully considered the circumstances of the trial and sentencing proceedings in Mr. Smith's case. See Smith, 758 F. Supp. at 693 ("[A]fter reviewing the entire record ..."). See also Statement of the Case, supra (discussing those circumstances and the review afforded by the District Court and Court of Appeals).

And contrary to the Attorney General's current assertion, there is no confusion in the Eleventh Circuit's precedent where, as in Mr. Smith's case, jurors are precluded from considering "substantial" mitigating evidence. See Smith, 758 F. Supp. at 693-94, 696. In such cases, as this Court has held, see Skipper, the burden is on the State to prove that the error was harmless beyond a reasonable doubt. Id.; see also Jackson v. Dugger, 931 F.2d 712, 716-18 (11th Cir. 1992) (State failed to establish that the jury's failure to consider "significant" mitigation was harmless beyond a reasonable doubt); Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989)

(same); Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991) (State could not establish that the jury's failure to consider "substantial" mitigation was harmless); Delap v. Dugger, 890 F.2d 285, 306 n.23 (11th Cir. 1989) (The State could not establish that the jury's failure to consider "substantial" mitigation was harmless and any questions arising from the Eleventh Circuit's decisions were therefore irrelevant to the petitioner's case).

As Chief Judge Stafford summarized:

> A synthesis of the [Eleventh Circuit's] cases leads this court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence .... If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produces substantial mitigating evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut. It is only when petitioner produces some, but not substantial, mitigating evidence that the district court's role is unclear [under the Eleventh Circuit's cases].

Smith, 758 F. Supp. at 693 (emphasis in original).

The State's current petition provides no argument demonstrating that Frank Smith's case did not involve "substantial" mitigation. See also Smith, 758 F. Supp. at 694, 696 (State failed to explain why the error should be found harmless or even to refer to the evidence).

(II)

The State next attempts to show that there is an absence of a "uniform standard" in the Eleventh Circuit. The State notes that in some cases the Court of Appeals has found Hitchcock errors

harmless, while in others it has found the errors harmful. See Petition, pp. 40-41. The State also devotes much of its petition to assertions of its disagreement with the result in Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). See Petition for Writ of Certiorari, pp. 38-39.

This Court denied the State's petition for writ of certiorari in Gore. See Singletary v. Gore, 112 S.Ct. 956 (1992). Mr. Smith's case is not the place for re-argument of the Gore result. As to the Eleventh Circuit's decisions, the fact that in some cases the errors have been found harmful, while in others the errors have been found harmless demonstrates that the Court of Appeals has sought to meaningfully apply the Chapman/Skipper standard -- the very standard applied in Mr. Smith's case. See Smith v. Singletary, 970 F.2d at 766, applying Chapman v. California.

Indeed, Chief Judge Tjoflat (one of the Judges presiding in Mr. Smith's case), presided in Clark v. Dugger, 834 F.2d 561 (11th Cir. 1987), a case in which the Court of Appeals found the Hitchcock error harmless. See also Petition, p. 40 (relying on Clark). Judge Hatchett (another member of the Smith panel), presided in Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989), another case in which the Hitchcock error was found harmless and on which the State now relies. Petition, p. 41. And Judge Edmondson (the third member of the Smith panel), presided in Jackson, a case holding that the petitioner must identify "significant" mitigating evidence before receiving review under Chapman. See Jackson v. Dugger, 931 F.2d 712, 717-18 (11th Cir. 1991).

The panel members in Smith were quite aware of the fact that Hitchcock errors can be found harmless. Each Judge has extensive experience in evaluating claims of Hitchcock error. The fact that the Eleventh Circuit Court of Appeals has found the error harmless in some cases and harmful in others demonstrates that the Court is careful in its review under Chapman. This Court has denied petitions for certiorari in each type of case. See Singletary v. Gore, 112 S.Ct. 956 (1992) (denying state's request for certiorari review as to the ruling in Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991), and Gore v. Dugger, 763 F. Supp. 1110 (M.D. Fla. 1989)); Tafero v. Dugger, 110 S.Ct. 1834 (1988) (denying the inmate's request for certiorari review as to the ruling in Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989)); Singletary v. Jackson, 111 S.Ct. ___ (1991) (denying the State's request for certiorari review as to the ruling in Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991)); Clark v. Dugger 485 U.S. 982 (1988) (denying the inmate's request for certiorari review as to the ruling in Clark v. Dugger, 843 F.2d 1561 (11th Cir. 1987)); Dugger v. Delap, 110 S.Ct. 2628 (1990) (denying the State's request for certiorari review as to the ruling in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989)); Singletary v. Booker, 112 S.Ct. 277 (1991) (denying the State's request for certiorari review as to the ruling in Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991)); Demps v. Dugger, 110 S.Ct. 1834 (1990) (denying the inmate's request for certiorari review as to the decision in Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989)).

(III)

Without any discussion of the actual record, the State's petition then asserts its disagreement with the result reached by the District Court and Court of Appeals. Recognizing that "the ultimate determination of whether federal constitutional error is harmless is a federal question," Jackson v. Dugger, 931 F.2d 712, 717 (11th Cir. 1991); Booker v. Dugger, 922 F.2d 633, 636 n.4 (11th Cir. 1991); Smith v. Dugger, 758 F. Supp. at 691, the District Court and Court of Appeals thoroughly evaluated the record and found that two Hitchcock errors were established in this case: 1) "the state trial judge prevented ... the jury from considering mitigating circumstances..." Smith v. Singletary, 970 F.2d at 766; and 2) "the state trial judge prevented defense counsel from presenting ... mitigating circumstances..." Id.

As to the first error, the District Court noted, "While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the state neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible." Smith v. Dugger, 758 F. Supp. at 694.[10]

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[10]The District Court outlined this evidence as follows:

> [T]here was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even
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> (continued...)

As to the second error, the District Court noted, "As to the proffered 'nonrecord' nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation ... about why the evidence would not have influenced the jury to recommend a life sentence." Smith, 758 F. Supp. at 694.[11]

On either basis, the District Court and Court of Appeals found that the error could not be deemed harmless beyond a reasonable doubt. See Smith v. Dugger, 758 F. Supp. at 696; Smith v. Singletary, 970 F.2d at 766. Even in its current petition, the State presents absolutely no argument addressing why the error in

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[10](...continued)
though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

Smith, 758 F. Supp. at 694.

[11]The District Court outlined this evidence as follows:

> [T]here was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

Smith, 758 F. Supp. at 694.

the jury's being precluded from considering the record mitigation can be found harmless.

As to the mitigation counsel did not develop or present because of the constraints, the State's petition presents only its disagreement with the District Court's findings that the restrictions affected counsel. See Petition, pp. 46-49. The State, however, does not argue that the District Court's findings were "clearly erroneous." Cf. Amadeo v. Zant, 108 S.Ct. 1771 (1988) (district court's findings should be upheld unless they are "clearly erroneous"). The Court of Appeals noted "that the record well supports the district court's findings of fact..." Smith, 970 F.2d at 766.

The veracity, reliability and "substantial" nature of the excluded mitigating evidence was not contested by the State in the District Court or Court of Appeals, see Smith, 758 F. Supp. at 694 (State neither "explains why this court might find such evidence to be insubstantial" nor "contests the veracity of the evidence"), and the State has presented no argument challenging the substantiality or reliability of the excluded mitigation in its certiorari petition.

The State's disagreement with the decisions of the District Court and Court of Appeals does not warrant the reversal of those decisions.

(IV)

The State finally states, "[T]he State would demand that the federal courts do an appropriate analysis when applying a harmless

error assessment ..." and cites Justice O'Connor's concurring opinion in Sochor v. Florida, 112 S.Ct. ___, 119 L.Ed.2d 326 (1992), for the proposition that a court's "bald assertion that an error of constitutional dimensions was 'harmless' (harmful) cannot substitute for a principled explanation of how the court reached that conclusion." Petition, p. 54, citing Sochor, 119 L.Ed.2d at 342 (O'Connor, J.).

There is nothing "bald" about the decisions of the District Court and Court of Appeals in this case. A review of the District Court's order (quoted above and appended hereto) can leave no doubt about the thoroughness of the review afforded to the parties in this case, including the care with which the Court addressed the State's arguments.

CONCLUSION

The District Court's order in Smith is now relied upon not only by jurists in the Eleventh Circuit, but also by members of the Florida Supreme Court, who have characterized Chief Judge Stafford's "learned analysis" as "entirely consistent" with the "prevailing view" employed to address claims of Hitchcock error. See Meeks v. Dugger, 576 So. 2d 713, 719 (Fla. 1991) (Kogan and Barkett, JJ.). Applying this Court's precedent, Chief Judge Stafford and the unanimous Court of Appeals found that the constitutional errors which resulted when "the state trial judge prevented defense counsel from presenting" and when that judge "prevented the jury from considering" mitigating circumstances could not be held "harmless beyond a reasonable doubt." Smith v.

Singletary, 970 F.2d at 766, relying on Chapman v. California, 386 U.S. 18 (1967).

The State's petition presents neither a substantial nor a debatable question, and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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(Counsel for Petitioner)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 19th day of January, 1993.

Attorney

Frank Elijah SMITH, Petitioner–Appellee, Cross–Appellant,

v.

Harry K. SINGLETARY, Respondent–Appellant, Cross–Appellee.

No. 90–3831.

United States Court of Appeals, Eleventh Circuit.

Aug. 18, 1992.

After defendant's state capital murder conviction was affirmed on direct appeal, 424 So.2d 726, defendant petitioned for writ of habeas corpus. The United States District Court for the Northern District of Florida, No. 90–40035–WS, William Stafford, Chief Judge, conditionally granted writ, 758 F.Supp. 688, and appeal was taken. The Court of Appeals held that error in capital case arising when state trial judge prevented defense counsel from presenting and jury from considering mitigating circumstances not listed in Florida death penalty statute was not harmless beyond reasonable doubt.

Affirmed.

Habeas Corpus ⇐508

Error in capital case arising when state trial judge prevented defense counsel from presenting and jury from considering mitigating circumstances not listed in Florida death penalty statute was not harmless beyond reasonable doubt. West's F.S.A. § 921.141.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances not listed in the Florida death penalty statute. Fla.Stat. § 921.141. The district court ruled that this *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), error was not harmless beyond a reasonable doubt. *Smith v. Dugger*, 758 F.Supp. 688 (N.D.Fla.1990).

Our review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts. This court is unable to say that the *Hitchcock* error is not harmful beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Accordingly, the district court is affirmed.*

AFFIRMED.

* The history of this case is found at *Smith v. State*, 424 So.2d 726 (Fla.1982), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); *Smith v. State*, 457 So.2d 1380 (Fla. 1984); *Smith v. Dugger*, 840 F.2d 787 (11th Cir.1988); *Smith v. Dugger*, 888 F.2d 94 (11th Cir.1989); *Smith v. State*, 556 So.2d 1096 (Fla. 1990); and *Smith v. Dugger*, 493 U.S. 1064, 110 S.Ct. 1104, 107 L.Ed.2d 1012 (1990).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Frank SMITH, Petitioner,

v.

Richard L. DUGGER, et al., Respondents.

No. TCA 90-40035-WS.

United States District Court, N.D. Florida, Tallahassee Division.

June 8, 1990.

A defendant whose convictions of robbery, kidnapping, sexual battery and first-degree murder, and death sentence were affirmed by the Florida Supreme Court, 424 So.2d 726, filed a petition for writ of habeas corpus. The District Court, Stafford, Chief Judge, held that petitioner established that erroneous jury instruction given during the course of his sentencing proceeding unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute, and was not harmless error in light of other substantial nonstatutory mitigating evidence available.

Writ conditionally granted in part and denied in part.

1. Habeas Corpus ⇐770

The question of whether a constitutionally erroneous jury instruction was harmless error was a mixed question of law and fact meriting independent consideration by a federal habeas court, rather than the presumption of correctness accorded to factual findings. 28 U.S.C.A. § 2254(d).

2. Habeas Corpus ⇐508

In reviewing a federal habeas corpus petitioner's claim that the state trial court judge and jury were unconstitutionally precluded from considering, and defense counsel from presenting, mitigating circumstances not enumerated in the Florida death penalty statute, court had to determine first whether there was any credible nonstatutory mitigating evidence, and whether exclusion of mitigating evidence was harmful error. 28 U.S.C.A. § 2254(d); West's F.S.A. § 921.141; U.S.C.A. Const. Amends. 8, 14.

3. Habeas Corpus ⇐498

An erroneous jury instruction given during sentencing which unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in Florida death penalty statute was not harmless error; possible nonstatutory mitigating evidence included record evidence that defendant was not triggerman, that he tried to dissuade accomplice from killing victim, and that a "cooperating" accomplice was expected to receive a life sentence with eligibility for parole after eight or ten years, as well as nonrecorded evidence of defendant's history of alcohol and substance abuse, his epilepsy, the fact that he was abandoned and abused as a child, his nonviolent and meek disposition, and the fact that he had been diagnosed as having diffuse and long-standing brain damage. 28 U.S.C.A. § 2254(d); West's F.S.A. § 921.141; U.S.C.A. Const.Amends. 8, 14.

4. Habeas Corpus ⇐498

The fact that murder defendant's trial counsel's tactical decision not to present evidence on nonstatutory mitigating circumstances in light of existing law could not support an ineffective assistance of counsel claim, did not prevent consideration of habeas corpus petitioner's claim that erroneous jury instruction given during course of sentencing proceeding unconstitutionally precluded presentation and consideration of nonstatutory mitigating circumstances, where record suggested that counsel's strategy would have been different had case been tried after change in law made instruction erroneous. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254(d); U.S.C.A. Const.Amends. 6, 8, 14.

5. Habeas Corpus ⇐745

An evidentiary hearing was not needed to determine the harmfulness of an erroneous jury instruction given during the course of petitioner's sentencing proceeding which precluded presentation and consideration of mitigating circumstances not enumerated in Florida death penalty statute in light of state's failure to contest

veracity of proffered nonstatutory mitigating evidence and clarity of record as to constraining effect of erroneous instruction on defense counsel's tactics. 28 U.S.C.A. § 2254(d).

6. Habeas Corpus ⇐404

Habeas corpus petitioner's claims which were determined by trial court in postconviction relief motion to be procedurally barred were not entitled to federal habeas review absent a showing of cause for the default and prejudice attributable thereto. 28 U.S.C.A. § 2254(d).

7. Habeas Corpus ⇐481

A federal habeas corpus petitioner was not deprived of a right guaranteed by federal law by state trial judge's alleged failure to personally prepare his own orders when he allegedly signed an order prepared by the state in state murder prosecution.

Billy H. Nolas, Capital Collateral Representative, Tallahassee, Fla., for petitioner.

Carolyn Snurkowski, Asst. Atty. Gen., Tallahassee, Fla., for respondents.

ORDER

STAFFORD, Chief Judge.

This cause is before the court upon Frank Smith's second petition for writ of habeas corpus (document 1). Due to the important constitutional matters here presented, I feel obliged to set forth in detail my analysis for the benefit of those charged with the inevitable review of my decision in the federal appellate process.

I. BACKGROUND

A. Facts

The facts leading to Smith's conviction are well documented in the voluminous record of this brutal murder case. Briefly, on the evening of December 12, 1978, Smith, along with two accomplices, Johnny Copeland and Victor Hall, robbed a convenience store in Wakulla County, Florida. They then abducted the store clerk, Sheila Porter, and took her to a motel where they each committed sexual battery upon her. Victor Hall testified that the three men later drove Ms. Porter to a wooded area. There, Hall waited in the car while Smith and Copeland took her into the woods. Hall testified that he heard three gunshots, after which Copeland and Smith returned to the car alone. Sheila Porter's body was found two days later with three bullet wounds in the back of her head.

B. Procedural History

Found guilty of robbery, kidnapping, sexual battery, and first-degree murder, Smith was sentenced to death in accordance with the jury's recommendation. The sentencing judge found and weighed the following six aggravating factors—

(1) That the defendant had two prior convictions for violent felonies (robberies).

(2) That the murder was committed in the course of an enumerated felony (kidnapping).

(3) That the murder was committed to avoid arrest.

(4) That the murder was committed for pecuniary gain.

(5) That the murder was heinous, atrocious and cruel.

(6) That the murder was cold, calculated and premeditated—

against only one mitigating factor—that Smith was nineteen (19) years of age when the crime was committed.

Smith appealed his conviction and death sentence to the Florida Supreme Court. Finding no reversible error, the state supreme court affirmed Smith's convictions and death sentence, and certiorari review was subsequently denied. *Smith v. State*, 424 So.2d 726 (Fla.1982), *cert. denied*, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).

The Governor of Florida denied Smith clemency and signed a warrant scheduling his execution. Smith then filed motions in the state trial court seeking a stay of execution and post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court refused to grant a stay and denied Smith's 3.850 motion. The Florida Supreme Court affirmed the denial of post-conviction relief

and further denied Smith's original petition for a writ of habeas corpus raising the single issue of ineffective assistance of appellate counsel. *Smith v. State*, 457 So.2d 1380 (Fla.1984).

On October 13, 1984, Smith filed a petition for writ of habeas corpus in this court. Having stayed Smith's execution to permit time for consideration of his petition, this court held that the first ten of Smith's eighteen claims were procedurally barred. The remaining eight claims were denied on the merits without further evidentiary proceedings.

Raising six issues, Smith appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed this court's decision after finding no violation of Smith's constitutional rights. *Smith v. Dugger*, 840 F.2d 787 (11th Cir.1988). Smith thereafter filed a petition for rehearing in which he raised, *inter alia*, a claim under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). *Hitchcock* was decided by the United States Supreme Court after this court's decision and while Smith's case was on appeal in the Eleventh Circuit. Rehearing was subsequently denied but without prejudice to Smith's presenting his unexhausted *Hitchcock* claim to the Florida state courts. *Smith v. Dugger*, 888 F.2d 94 (11th Cir.1989). The Eleventh Circuit made clear that Smith's unexhausted *Hitchcock* claim was not foreclosed from federal review in a subsequent action, after exhaustion. Smith filed a timely petition for certiorari which is currently pending in the U.S. Supreme Court.

On July 31, 1989, Smith filed a second Rule 3.850 motion in state trial court. He raised twelve (12) claims, including a claim of error under *Hitchcock*. All claims but one were found to be procedurally barred. The one exception—Smith's *Hitchcock* claim—was denied on the merits. On appeal, the Florida Supreme Court held that, while the trial court's instructions to the jury indeed violated *Hitchcock*, such error was harmless beyond a reasonable doubt. All other claims were found to be procedurally barred. *Smith v. State*, 556 So.2d 1096 (Fla.1990).

While Smith's *Hitchcock* claim was still being considered in the Florida courts, the Governor of Florida issued a second death warrant, setting Smith's execution for 7:00 a.m. on February 9, 1990. After the Florida Supreme Court denied all relief on February 8, 1990, but before his scheduled execution the following morning, Smith filed with this court a motion for stay of execution along with his second petition for writ of habeas corpus. With but a few short hours before Smith's scheduled early morning execution, and needing time to give proper consideration to both Smith's 176-page petition for writ of habeas corpus as well as the state's response, the court granted Smith's request for a stay. A complete, orderly record has now been compiled in this court, and Smith's claims are ripe for review.

II. THE HITCHCOCK CLAIM

Relying on *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), petitioner first contends that the jury and the judge in the state trial court were unconstitutionally precluded from considering—and defense counsel from presenting—mitigating circumstances not enumerated in the Florida death penalty statute. Fla.Stat. § 921.141. In *Lockett*, the Supreme Court concluded that the eighth and fourteenth amendments require a sentencer to consider all relevant mitigating evidence in capital cases. Despite *Lockett*, the advisory jury in *Hitchcock* was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances. The Supreme Court found that, in the absence of a showing that the error was harmless, such exclusion of mitigating evidence rendered Hitchcock's death sentence invalid. The Court reiterated its holding in *Lockett* that the eighth amendment, applicable to the states through the fourteenth amendment, requires that a capital sentencer not be precluded from considering, as a mitigating factor, *any* aspect of a defendant's charac-

ter or record that the defendant proffers as a basis for a sentence less than death.

In this case, the state trial judge gave virtually the same instruction as that given in *Hitchcock*. At the conclusion of the penalty phase, the trial judge instructed the jury: "The mitigating circumstances which you may consider, if established by the evidence, are these: [listing the seven statutory mitigating circumstances enumerated in the Florida death penalty statute]." In *Hitchcock*, the trial judge instructed: "The mitigating circumstances which you may consider shall be the following: [listing the same seven statutory mitigating circumstances]." As in *Hitchcock*, the jury in this case was directed to consider only statutory factors in mitigation. As in *Hitchcock*, then, the jury instruction given in this case violated petitioner's eighth amendment right to "present any and all relevant mitigating evidence that is available." *Hitchcock*, 481 U.S. at 399, 107 S.Ct. at 1824, 95 L.Ed.2d at 353 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

While conceding that the trial court's instruction was erroneous, the state respondent here argues that both the trial court and the Florida Supreme Court were correct in concluding that the error was harmless. The Eleventh Circuit has said that a *Hitchcock* violation is subject to harmless error analysis. *Demps v. Dugger*, 874 F.2d 1385, 1389 n. 12 (11th Cir.1989) (citing cases), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Such analysis is governed by the strict "harmless beyond a reasonable doubt" standard enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under *Chapman*, the court must *presume* prejudice unless and until the state proves *beyond a reasonable doubt* that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation. *See Brown v. Dugger*, 831 F.2d 1547 (11th Cir.1987) (discussing *Chapman* standard where constitutionally-proscribed evidence was admitted at trial). If there remains any possibility that the jury's sentencing decision was affected by the erroneous jury instruction, and if the state cannot refute that possibility, the error cannot be deemed harmless.

[1] While state court factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), harmlessness of a constitutionally erroneous jury instruction is not an issue of fact entitled to such a presumption. It is, instead, a mixed question of law and fact meriting independent consideration by a federal habeas court. This court, therefore, cannot simply defer to the state courts' findings of harmlessness. *See, e.g., Delap v. Dugger*, 890 F.2d 285 (11th Cir.1989) (finding *Hitchcock* error not harmless despite state courts' findings to the contrary).

Mindful that there are no precise guidelines for determining harmlessness in a *Hitchcock* context, *see Demps*, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the *Hitchcock* claim), the court finds instructive, a review of Eleventh Circuit cases involving *Hitchcock* claims.

In *Demps*, the petitioner was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on *Hitchcock* grounds, arguing that his jury was impermissibly precluded from considering nonstatutory mitigating circumstances. The Eleventh Circuit panel agreed, the trial judge having given an instruction virtually identical to the one erroneously given in *Hitchcock*.

Judge Fay, writing the lead opinion, examined each of the four types of evidence which Demps alleged would have influenced the jury to recommend life, determined that none of the evidence excluded from the jury's consideration would have affected its sentencing recommendation, and thus concluded that any error which may have occurred was harmless. Judge Fay emphasized that, in evaluating whether a *Hitchcock* error is harmless, a court must—after an in-depth review of the entire record—"determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to

recommend a life sentence." *Demps*, 874 F.2d at 1390.

Judge Clark agreed with Judge Fay that Demps was not entitled to a new sentencing hearing as a result of the erroneous *Hitchcock* instruction. He was unable to agree with Judge Fay, however, that a harmless error analysis was appropriate. Judge Clark opined that, "[w]here there is no nonstatutory mitigating evidence there can be no *Hitchcock* error and harmlessness need not be considered." *Id.* at 1396. Because he concluded that Demps failed to present even arguably credible evidence of nonstatutory mitigating circumstances, Judge Clark did not believe that the court needed to engage in harmless error analysis. He did suggest, however, that a case should be returned to the state court for resentencing if any credible nonstatutory evidence exists, whether such evidence was heard but excluded from consideration or whether it was not even offered because Florida law at the time taught that such evidence was not admissible. *Id.* at 1395.

Largely because he felt the record contained no factual findings on Demps's claims of mitigating evidence, Judge Johnson dissented from the majority's finding that Demps was not entitled to a resentencing hearing under *Hitchcock*. Judge Johnson believed that the case should be remanded to the district court for findings as to the truthfulness of Demps's claims. If the district court were to find that Demps had no true mitigating evidence to offer, Judge Johnson would concede that any error in the jury instructions was harmless. If, on the other hand, the district court were to find any of Demps's claims of mitigating evidence to be true, then Judge Johnson would conclude that excluding the evidence from the jury's consideration would have constituted reversible error.

Citing *Knight v. Dugger*, 863 F.2d 705 (11th Cir.1988), Judge Johnson stressed that there is a narrow range of situations in which *Hitchcock* error may be harmless. In *Knight*, respondent argued that any *Hitchcock* error was harmless because "so many aggravating factors were found (four) that no amount of non-statutory mitigating evidence could change the result in this case." 863 F.2d at 710. In rejecting the state's reasoning, the Eleventh Circuit stated:

> No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of *Lockett* and its progeny....
>
> While we are not prepared to definitively state what might constitute harmless error in the *Lockett* context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case.

Id. To paraphrase Judge Johnson, the *Knight* decision leaves little room for the application of harmless error analysis except in two limited situations: (1) where the defense produces no nonstatutory mitigating evidence, and (2) where the nonstatutory mitigating evidence presented is so insignificant that it would not have altered the jury's decision. *See Demps*, 874 at 1393 (Judge Johnson, dissenting); *Jones v. Dugger*, 867 F.2d 1277 (11th Cir.1989).

The Eleventh Circuit has found *Hitchcock* error to be harmless only three times. *See Demps*, 874 F.2d at 1385 (error harmless where petitioner failed to present any credible evidence of mitigating circumstances); *Tafero v. Dugger*, 873 F.2d 249 (11th Cir.1989) (error harmless where defense counsel purposely presented no mitigating evidence for strategic reasons), *cert. denied*, — U.S. —, 110 S.Ct. 1834, 108 L.Ed.2d 962; *Clark v. Dugger*, 834 F.2d 1561, 1569–70 (11th Cir.1987) (error harmless where "there simply were no nonstatutory mitigating circumstances to consider"), *cert. denied*, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). In contrast, the court has many times granted relief on *Hitchcock/Lockett* grounds. *See, e.g., Delap v. Dugger*, 890 F.2d 285 (11th Cir.1989) (error not harmless where there was significant psychological evidence which the jury, if it followed the court's erroneous *Hitchcock* instruction, would have considered

only if it rose to the level of a statutory mitigating factor—i.e., only if the jury found that Delap committed the crime "under the influence of *extreme* mental or emotional disturbance"); *Jones v. Dugger*, 867 F.2d 1277, 1280 (11th Cir.1989) (error not harmless where there was mitigating evidence in the record that petitioner was a model prisoner and "a very nice person [who] got along well with people [and] was never no trouble"); *Knight v. Dugger*, 863 F.2d 705 (11th Cir.1988) (error not harmless where there was mitigating evidence in the record about petitioner's mental state and his troubled family background, and the state argued only that the *Hitchcock/Lockett* error was harmless because there were multiple aggravating circumstances); *Ruffin v. Dugger*, 848 F.2d 1512 (11th Cir.1988) (granting relief on *Hitchcock/Lockett* claim, without discussion of harmlessness, where there was evidence in the record of petitioner's mental state, his lack of an adult criminal record, and the alleged domination of petitioner by his accomplice), *cert. denied*, 488 U.S. 1044, 109 S.Ct. 872, 102 L.Ed.2d 995 (1989); *Magill v. Dugger*, 824 F.2d 879 (11th Cir.1987) (error not harmless where there was evidence in the record that petitioner felt remorse for his actions); *Hargrave v. Dugger*, 832 F.2d 1528 (11th Cir.1987) (granting relief on *Hitchcock/Lockett* claim, without discussion of harmlessness, where there was mitigating evidence in the record of petitioner's steady employment, below-average intelligence, and history of drug abuse), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

[2] A synthesis of the above-cited cases leads this court to conclude that, in reviewing a *Hitchcock* claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard had the teachings of *Hitchcock* and its progeny been known at the time. If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find that the *Hitchcock* error, if any, was harmless. If, as here, petitioner produces *substantial* mitigating evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut. It is only when petitioner produces some, but not substantial, mitigating evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once alluded to conflicting viewpoints about the role of the habeas court in such a situation. *See Tafero*, 873 F.2d at 252 n. 5; *Delap*, 890 F.2d at 306 n. 23.

[3] In this case, as mentioned previously, the state urges the court to deny all relief on the basis of harmless error. The thrust of the state's argument, however, is difficult to discern. On the one hand, the state suggests that defense counsel did, in fact, argue to the jury several alleged mitigating factors which did not fit clearly within the confines of the enumerated statutory factors. The state notes, for example, that defense counsel included in his arguments to the jury that (1) the defendant did not personally kill the victim, (2) the defendant was fifteen years old when he committed his prior robberies, (3) the defendant had been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice. The state writes:

> Clearly from the tone of the closing arguments presented, [defense counsel] *intended* those jurors to consider the minuteness of evidence in relationship to those mitigating factors. He was *desirous* that the jury and judge find *statutory mitigation* but he made it perfectly clear that the slightest evidence in "mitigation" be considered.

Document 7, p. 35 (emphasis in original).

If the state is suggesting that the *Hitchcock* error is harmless because defense counsel could and did, both present and argue, nonstatutory mitigating factors, the suggestion must be rejected. The Eleventh Circuit has made it abundantly clear that the actual introduction of nonstatutory mitigating evidence is meaningless if the

jury is instructed not to consider such evidence. *Delap*, 890 F.2d at 304 (citing cases). Furthermore, the error is not rendered harmless just because the judge himself hears and considers nonstatutory mitigation. *Jones*, 867 F.2d at 1280 ("[A] trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by *Lockett* error"); *Magill v. Dugger*, 824 F.2d 879, 894 (11th Cir.1987). It follows, then, that the error does not become harmless just because the state trial judge later states—as he did in this case—that "[e]ven if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty." *See* document 7, p. 35.

The state also suggests that this case is similar to *Clark* and *Tafero*, both of which resulted in findings of harmlessness because there were no mitigating factors. If, by drawing an analogy to *Clark* and *Tafero*, the state is suggesting that there simply is no nonstatutory mitigating evidence in this case, the record belies such suggestion. As petitioner points out, there was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of *Hitchcock* been available at the time of Smith's trial. For example, petitioner has filed affidavits, letters, and reports which indicate, *inter alia*, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the state neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. As to the proffered "nonrecord" nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation—other than conclusory comments about the enormity of Smith's crime—about why the evidence would not have influenced the jury to recommend a life sentence.

Instead, the state directs the court's attention to the fact that a *Lockett* issue was the basis for a previous unsuccessful attack on trial counsel's representation under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The state writes: "Necessarily in finding [defense counsel] made tactical decisions in the presentation of mitigating evidence at the penalty phase of the 1979 trial, and finding no prejudice under *Strickland v. Washington*, the harmless error analysis regarding *Hitchcock* is made much simpler." Document 7, p. 30. Presumably, the state wants the court to ignore the proffered evidence because the court previously found, in a *Strickland* setting, that counsel chose not to present mitigating evidence for strategic reasons. Such finding allowed this court, as well as the Eleventh Circuit, to conclude (without addressing the prejudice prong of the *Strickland* test) that petitioner's *Strickland* claim was without merit.

Mindful that claims under *Strickland* and *Hitchcock* are separate and distinct, the court notes that defense counsel's tactical decisions were made in the context of the law as it then existed. The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction. To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court to give the constraining instruction. *Hitchcock*, 481 U.S. at 393, 107 S.Ct. at 1821, 95 L.Ed.2d at 347. That later decision did not make counsel's prior performance ineffective under *Strickland*. It did, however, make it necessary for this court to now determine whether the erroneous instruction affected the jury's decision as to penalty. To make that determination, the court must look at the various types of nonstatutory mitigating factors which either were presented, or could have been presented, to the jury. Because of the change in the law, this court cannot merely ignore the evidence on the ground that defense counsel was previously found to have made a tactical decision not to present certain kinds of evidence during the penalty phase of the trial.

Perhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous instruction. In *Clark*, 834 F.2d at 1566–70, for example, petitioner's ineffective assistance of counsel claim was denied because the court found that counsel—after thorough investigation—made a tactical decision to introduce no testimony during the penalty phase of Clark's trial. That same tactical decision was used to support the court's conclusion that the *Hitchcock* error was harmless. The court wrote:

> Here, however, there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained *supra*, Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever.... Having failed to produce evidence of any nonstatutory mitigating factors, Clark can hardly complain that the trial court restricted the jury's ability to consider them. We therefore conclude that any *Hitchcock* error was harmless.

834 F.2d at 1569–70. Importantly, there was no evidence that counsel's strategies would have been different had she defended the case post-*Hitchcock*. At the time of trial, and without the benefit of *Hitchcock*, she decided that there simply was no credible evidence of mitigating factors. Two years later, and despite the *Hitchcock* decision, there was still no credible evidence of mitigating factors. In such a case, counsel's tactical decision not to present mitigating evidence supports the court's denial of both a *Strickland* and a *Hitchcock* claim. Here, however, the situation is different.

[4] In Smith's case, the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction. In fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors. In addition, he has filed an affidavit describing how his strategies were limited by the instruction which he knew would be given to the jury. Perhaps most significantly, unlike in *Clark*, there *was* nonstatutory mitigating evidence in this case which either was presented or could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given. In sum, the record before me suggests that counsel's strategy would have been different had the case been tried post-*Hitchcock*. Under such circumstances, this court cannot accept the state's premise that the tactical decision which supported the denial of petitioner's ineffective assistance of coun-

sel claim should, *ipso facto*, be used to deny petitioner's *Hitchcock* claim.

Because the State of Florida has placed great importance upon the advisory jury in the Florida sentencing scheme, this federal court must be especially cautious when speculating about the effect of a constitutional error on that state advisory jury. Indeed, as explained earlier, this court is required to *presume* prejudice unless and until the state proves *beyond a reasonable doubt* that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation.

The brutal, senseless murder of Sheila Porter was a horrible crime and completely justified the finding of many aggravating factors. Yet, under the law binding upon this court, the State of Florida is required to do more than point this court to the enormity of the crime in order to defeat petitioner's claim for relief. *Knight*, 863 F.2d at 710 (relief granted where the state's only argument was that there were multiple aggravating circumstances justifying the imposition of the death penalty). Here, the state has done little else. My duty, then, is clear. Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the state has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of such evidence by the state court jury, and (c) this court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this court must GRANT conditional relief on the *Hitchcock* claim of petitioner Frank Smith.

III. REQUEST FOR EVIDENTIARY HEARING

[5] The state trial court did not hold an evidentiary hearing to determine the harmfulness of the *Hitchcock* error in Smith's case. Had the state in any manner contested the veracity of the proffered nonstatutory mitigating evidence, or had the record been less clear about the constraining effect of the erroneous instruction on the tactics of defense counsel, this court might be obliged to hold such a hearing. As the record stands, however, the *Hitchcock* issue is clearly focused for this court and can be resolved without an evidentiary hearing here. Accordingly, petitioner's request for an evidentiary hearing before this court is DENIED.

IV. OTHER CLAIMS

[6] Smith raises five additional claims in his petition for writ of habeas corpus. Of these five claims, four (claims III—VI) were raised before the trial court in a motion for post-conviction relief. The trial court denied Smith's motion, finding that each of the four claims was procedurally barred. The Florida Supreme Court affirmed the trial court's decision, agreeing that the four claims were procedurally barred. *Smith v. State*, 556 So.2d 1096 (Fla.1990). Because the state courts clearly relied on procedural bar as an independent state basis for disposition of these four claims, there can be no federal habeas review unless Smith can show "cause" for the default and "prejudice attributable thereto." *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Because the court concludes that Smith has not shown adequate "cause" for his default, Claims III through VI of Smith's petition shall not be addressed here.

[7] The remaining claim in Smith's petition—that Smith was denied his right to a full, fair, and independent determination of his second motion for post-conviction relief—fails to raise an issue of federal law. Smith basically complains that the trial judge signed an order prepared by the state. While others might question the propriety of such action, federal law clearly does not require that a judge personally prepare his own orders. Review of the record indicates that a fair hearing was held (albeit not an evidentiary hearing), and there is nothing to indicate that the order, by whomever prepared, does not reflect the

trial judge's ruling. Absent any error under federal law, this court will not question the procedures used by the state trial court. Finding no such error, the court concludes that Smith is not entitled to relief on Claim II of his petition for habeas corpus, and the same is DENIED.

V. CONCLUSION

Based upon the foregoing analysis, the court concludes that petitioner has met his burden of establishing that an erroneous jury instruction given during the course of his sentencing proceeding unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute. The state has not proven beyond a reasonable doubt that the giving of this erroneous instruction to the sentencing jury was harmless. Accordingly, it is ORDERED:

The petition for writ of habeas corpus is hereby GRANTED unless the state, within a reasonable period of time, either resentences Smith in a proceeding that comports with *Lockett/Hitchcock* or vacates the death sentence and imposes a lesser sentence consistent with law. All other relief requested by petitioner Smith is hereby DENIED.

DONE AND ORDERED.

Margaret C. BLANK, et al., Plaintiffs,

v.

BETHLEHEM STEEL CORPORATION, and Bethlehem 1985 Salaried Pension Plan, a foreign corporation, Defendants.

No. 88-867-Civ-J-12.

United States District Court, M.D. Florida, Jacksonville Division.

Feb. 9, 1990.

Retirement benefit plan participants filed action against employer and plan as result of denial of their claims for retirement benefits following sale of their division. Employer and plan moved for summary judgment and/or dismissal. The District Court, Melton, J., held that: (1) subject benefits were not accrued and were therefore subject to termination; (2) termination decision would be reviewed under arbitrary and capricious standard, not de novo; and (3) General Pension Board did not act in arbitrary and capricious manner when it drafted regulations that rendered subject employees ineligible for retirement benefits, then enforced those regulations against their claims.

Motion granted.

1. Pensions ⇐121

ERISA imposes no obligation to pay benefits before employee reaches normal retirement age. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

2. Pensions ⇐122

"Rule-of-65 Retirement" benefits were not accrued and were thus subject to termination; contingent nature of those benefits was plain from condition that eligibility be preceded by plant shut down, layoff, or disability. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

3. Pensions ⇐84

Decisions of General Pension Board would be reviewed under arbitrary and capricious standard, not de novo, in light of broad and express discretion conferred by plan on Plan Administrator and Board.

4. Pensions ⇐68

General Pension Board did not act in arbitrary and capricious manner when it drafted regulations that rendered employees of sold division ineligible for "Rule-of-65 Retirement" benefits, then enforced those regulations against employees' claims; Board acted in concert with sales

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92-926 OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

Case No. _____

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

RESPONDENT'S MOTION FOR IN FORMA PAUPERIS RELIEF AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, FRANK ELIJAH SMITH, through counsel, respectfully moves for in forma pauperis relief and for leave to proceed in forma pauperis and in support of this application respectfully submits as follows:

1. This case is before the Court on a petition for writ of certiorari filed by the Florida Attorney General addressing aspects of the decision of the United States Court of Appeals for the Eleventh Circuit.

2. Mr. Smith is indigent. He was declared indigent by

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the state trial court at the time of the proceedings resulting in his capital conviction and sentence of death and counsel was then appointed. Thereafter, Mr. Smith was also found to be indigent and in forma pauperis relief was granted by the state courts during direct appeal and post-conviction proceedings.

3. During habeas corpus proceedings, the United States District Court for the Northern District of Florida found Mr. Smith to be indigent and granted in forma pauperis relief.

4. Before the Eleventh Circuit Court of Appeals Mr. Smith was also declared to be indigent and in forma pauperis relief was granted.

5. Counsel was appointed for Mr. Smith pursuant to the Criminal Justice Act.

6. Mr. Smith is currently incarcerated at the Florida State Prison, Starke, Florida, and is without funds to secure services necessary to proceed in this Court (e.g., printing fees, etc.) or to pay any fees. Undersigned counsel's appointment by the Court of Appeals pursuant to the Criminal Justice Act continues into the current proceedings on the petition for writ of certiorari.

7. Undersigned counsel has represented Mr. Smith since 1984 and affirms that all statements related above in paragraphs 1-6 are true and correct.

WHEREFORE, Respondent respectfully requests that the Court allow him to proceed in forma pauperis, given his indigency.

Respectfully submitted,

Billy H. Nolas
Julie D. Naylor
(Counsel for Respondent)

P.O. Box 4905
Ocala, FL 34478-4905
(904) 620-0458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitaol, Tallahassee, Florida 32399-1050, this 19th day of January, 1993.

Attorney